A

DIGEST

OF THE

NISI PRIUS REPORTS,

WITH

NOTES AND REFERENCES,

AND SOME

ORIGINAL CASES, CHIEFLY COLLECTED ON THE WESTERN CIRCUIT.

BY

JAMES MANNING, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW,

SECOND EDITION.

WITH CONSIDERABLE ADDITIONS.

Legalium plures sunt species necesse est, propterea quod multæ sunt leges et varias habent formas. Alia est cujus verbis nitimur, alia cujus voluntate: alias nobis, cum ipsi nullam habemus, adjungimus: alias inter se comparamus, alias in diversum interpretamur. QUINCT. LIB. 3. CAP. 6.

LONDON:

PRINTED FOR *J.* AND *W. T. CLARKE*, LAW BOOKSELLERS,

PORTUGAL STREET, LINCOLN'S INN.

1820.

TO

THE HONORABLE

SIR JOHN BAYLEY, KNIGHT,

ONE OF THE JUSTICES

OF

HIS MAJESTY'S COURT

OF

KING'S BENCH

This Work

IS

MOST RESPECTFULLY

AND

MOST GRATEFULLY INSCRIBED.

ADVERTISEMENT

TO THE SECOND EDITION.

THE time which has elapsed since the appearance of the first edition of this work has enabled the Editor to complete the analysis of Mr. Campbell's Reports, to add that of Mr. Holt's, and to go through the first volume and the first and second parts of the second volume of Mr. Starkie's Reports.

The third number of Mr. Starkie's second volume having been published after some of the following sheets were printed off, the greater part of the cases contained in that number are thrown into an Appendix, which also embraces the first number of Mr. Gow's Reports, together with some original cases which appeared to be of too great length to be inserted in the body of the Digest.

The Editor feels it incumbent on him to state that, to avoid further delay, instead of *analyzing* Mr. Gow's cases, he has availed himself of that gentleman's marginal abstracts.

It is intended to submit to the public such decisions upon the Western Circuit as may involve points of general importance as soon as a sufficient number have been collected to form a separate volume.

It is with much pleasure, the Editor records the following testimony:—The case of *Bland* v. *Swafford*, Peake, 60, (post, page 321,) being cited in K. B. by Mr. Serjeant Hullock, in last Easter term, the Lord Chief Justice said, "My brother Peake's Reports are remarkably correct. I went the same circuit and was in the habit of taking notes. On many occasions I have compared the cases, and I know his to be particularly accurate."

PAPER BUILDINGS,
21st June, 1820.

ADVERTISEMENT

TO THE FIRST EDITION.

THE present Volume is founded upon an abridgment of the Reports of Peake, Espinasse, and Campbell, undertaken on the plan of Comyns's Digest, to which it was originally designed as a supplement.

In the progress of the work it was apprehended, that an arrangement better adapted to modern practice might be substituted for that of Lord Chief Baron Comyns, and that its value, as a separate publication, would be increased by adding to the analysis of Nisi Prius decisions, references to cases determined in a more solemn manner. With a view to each of these objects, treatises in common, civil, and commercial law, upon the principal titles comprised in the following pages, were consulted. No reference has, however, been admitted without examination. It was the Editor's wish to mark with precision, in every instance, the relation between the authority cited, and the case to which it was applied; and he did not choose to direct his readers to books, which might possibly afford no information upon the immediate subject of their inquiries.

Lamb-Buildings, Temple,
Easter Term, 1813.

ABBREVIATIONS AND REFERENCES.

Abb. L. S.	Abbott's Law of Shipping, 4th edition.
Acc.	Agrees.
Ad. Ej.	Adams on Ejectment, 2d edition.
Aleyn	Aleyn's Reports.
Amb.	Ambler's Reports.
And.	Andrew's Reports.
Anstr.	Anstruther's Reports.
Arg.	Arguendo.
Ass.	Liber Assisarum.
Ast.	Aston's Entries.
Atk.	Atkyns's Reports, 3d edition.
B. and A.	Barnewall and Alderson's Reports in K. B.
Bac. Abr.	Bacon's Abridgment, 6th and 7th editions.
Barnes	Barnes's Notes, 3d edit.
Bayl.	Bayley on Bills, 3d edition.
B. L. M.	Beawes's Lex Mercatoria, 6th edition.
Bla.	Sir W. Blackstone's Reports.
Bla. Comm.	Blackstone's Commentaries.
B. N. P.	Buller's Nisi Prius.
Bos. and Pull.	Bosanquet and Puller's Reports in C. P.
Bradb.	Bradby on Distresses.
Bro.	Brooke's Abridgment.
Brod. and B.	Broderip and Bingham's Reports in C. P.
Bro. C. C.	Brown's Cases in Chancery, 2d edition.
Bro. P. C.	Brown's Cases in Parliament, 2d edition.
Bulst.	Bulstrode's Reports.
Burn	Burn's Justice, 21st edit.
Burr.	Burrow's Reports.
Ca. T. H.	Cases tempore Hardwicke.
Cart.	Carter's Reports.
Carth.	Carthew's Reports.
Chitty	Chitty's Reports.
Chitty Bills	Chitty on Bills, 5th edit.
Clayt.	Clayton's Reports.
Clift	Clift's Entries.
Co.	Coke's Reports.
Co. B. L.	Cooke's Bankrupt Laws, 6th edition.
Co. Litt.	Coke upon Littleton, 15th and 16th editions.
Cod.	Justiniani Codex.
Com. Dig.	Comyns's Digest, 4th edition.
Comb.	Comberbatch's Reports.
Cowp.	Cowper's Reports.
Cro. Car.	Croke's Reports, 3d vol.
Cro. El.	1st vol.
Cro. Jac.	2d vol.
Danv. Abr.	Danvers's Abridgment.
D. or Dig.	Justiniani Digesta, sive Pandectæ.
Dougl.	Douglas's Reports, 4th edition.
Dub.	Doubted.
Esp. D. N. P.	Espinasse's Nisi Prius Digest, 4th Edition.
F. or Fitz.	Fitzherbert's Abridgment.
F. N. B.	Fitzherbert's Natura Brevium (*a*).
Fitzg.	Fitzgibbon's Reports.
Forr.	Forrest's Reports.
Gilb. Ev.	Gilbert's Evidence, 6th edition.
H. Bla.	Henry Blackstone's Reports in C. P.
Hale, P. C.	Hale's Pleas of the Crown.
Hardr.	Hardres's Reports.
Hawk. P. C.	Hawkins's Pleas of the Crown.

(*a*) The references to the text of F. N. B. are made to the French editions, scarcely a page of the translation being free from material errors. The *writs* however are generally correct. The editor has collated the editions of 1616 and 1755; but the corrections in the last edition (1794) appear to be inconsiderable. A large proportion of the notes and marginal references in the English editions are either irrelevant or mis-printed.

Hob.	Hobart's Reports.
Hull.	Hullock on Costs, 2d edit.
Hutt.	Hutton's Reports.
I.	Justiniani Institutiones.
Imp. C. P.	Impey's Common Pleas, 5th edition.
Imp. K. B.	Impey's King's Bench, 8th edition.
Imp. Sher.	Impey's Sheriff, 3d edit.
Inst.	Coke's Institutes.
Jenkins	Jenkins's Centuries.
T. Jon.	Sir T. Jones's Reports.
W. Jon.	Sir W. Jones's Reports.
Keb.	Keble's Reports.
Keilw.	Keilway's Reports.
Kel.	Kelynge's Reports.
Leach, C. C.	Leach's Crown Cases.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lib. Ass.	Liber Assisarum.
Lilly	Lilly's Entries.
Lutw.	Lutwyche's Reports.
Madd.	Maddock's Reports.
M. & S.	Maule and Selwyn's Reports in K. B.
March	March's Reports.
Marsh.	Marshall's Reports.
Marshall Ins.	Marshall on Insurance, 2d edition.
Mer.	Merivale's Reports.
Mod.	Modern Reports, 5th edit.
Moore	Sir Francis Moore's Reports.
B. Moore	J. Bayley Moore's Reports in C. P.
Nolan P. L.	Nolan's Poor Laws.
Nov.	Justiniani authenticæ, sive novellæ constitutiones.
N. R.	Bosanquet and Puller's New Reports in C. P.
Noy M.	Noy's Maxims.
Noy R.	Noy's Reports.
Paley	Paley's Principal and Agent.
P. Wms.	Peere Williams's Reports.
Palm.	Palmer's Reports.
Park	Park on Insurance, 6th edition.
Peake Ev.	Peake's Law of Evidence, 3d edition.
Phillim.	Phillimore's Reports.
Phill. Ev.	Phillipps on Evidence.
Plowd.	Plowden's Commentaries.
Poph.	Popham's Reports.
Pothier	Oeuvres de Pothier, 2d edit. Orleans, 1772.
Quinct.	M. Fabius Quinctilianus de institutione oratoriâ.
Rastall	Rastall's Entries.
Ld. Raym.	Lord Raymond's Reports.
T. Raym.	Sir Thomas Raymond's Reports.
Rob. A. R.	Robinson's Admiralty Reports.
Roll. Abr.	Rolle's Abridgment.
Roll. Rep.	Rolle's Reports.
Rose	Rose's Reports.
Runn.	Runnington's Ejectment.
S. C.	Same case.
S. P. or S. PP.	Same point or points.
Salk.	Salkeld's Reports.
Saund.	Saunders's Reports.
Sav.	Savile's Reports.
Say. Costs	Sayer on Costs.
Say. Rep.	Sayer's Reports.
Sch. and Lef.	Schoales and Lefroy's Reports.
Selw.	Selwyn's Nisi Prius, 4th edition.
Show.	Shower's Reports, 2d edition.
Sid.	Siderfin's Reports.
Smith	J. P. Smith's Reports.
Stra.	Strange's Reports, 3d edition.
Sty.	Style's Reports.
T. R.	Durnford and East's Term Reports in K. B.
Taunt.	Taunton's Reports in C. P.
Tho. Co. Litt.	Thomas's Coke Littleton.
Tidd.	Tidd's Practice, 7th edit.
Toll.	Toller on Executors, 3d edition.
Vaugh.	Vaughan's Reports.
Vent.	Ventris's Reports.
Vern.	Vernon's Reports.
Ves.	Vesey Junior's Reports.
Vez.	Vezey Senior's Reports.
Vid.	Vidian's Entries.
Vin. Abr.	Viner's Abridgment.
Vinn. Inst.	Vinnii Institutionum Imperialium Commentarius.
Wentw.	Wentworth's Pleadings.
Willes	Willes's Reports.
Wilson	Wilson's Reports.
Y. B.	Year Books.
Yelv.	Yelverton's Reports.

INDEX AND CONTENTS.

INDEX AND CONTENTS.

DIGESTED INDEX

TO THE

NISI PRIUS REPORTS.

ABATEMENT.

(And see Bail A. 4 n. post.)

A. By death.

B. By plea.

(a) *Nonjoinder.*

(b) *Misnomer.*

(c) *Other action pending.*

A. By death.

1. If a surviving co-plaintiff proceed to trial without a suggestion upon the record, the proceedings are irregular, and the witnesses cannot be indicted for perjury in the course of them. *R.* v. *Cohen,* 1 Stark. 511. Ellenborough, C. J. 1816.

B. By plea.

B. (a) *Nonjoinder.*

(And see Action D. Partners, E.)

2. At the trial of an issue upon a replication of sole contract, *it was ruled,* that the defendant could not examine the alleged joint-contractor after releasing him. *Young* v. *Bairner,* 1 Esp. 103. Kenyon, C. J. 1794.

3. But the court held that the release made him competent, and granted a new trial, the Chief Justice concurring. *Ibid.*

4. To support a plea in abatement of nonjoinder of the assignees of a joint-contractor who is become a bankrupt, it is not sufficient to prove that they acted as assignees; the assignment must be proved. *Pasmore* v. *Bousfield,* 1 Stark. 296. Ellenborough, C. J. 1816.

N. As to the evidence upon this replication, see *Abbot* v. *Smith,* 2. Bla. 947. 951. 1 Wentw. 17, 33. *Gould* v. *Barnes,* 3 Taunt. 504. *Lucas* v. *Delacour,* 1 M and S. 249. Doct. Plac. 233.

5. Where the plaintiff's particular contains items which are owing from the defendant jointly with a partner who is not sued, the nonjoinder may be pleaded in abatement, though part of the demand be due from the defendant alone. *Colson et alt.* v. *Selby,* 1 Esp. 452. Kenyon, C. J. 1795.

And the court of K. B. refused a rule to set aside nonsuit: *ibid.* S. C. Tidd. 595.

B. (b) *Misnomer.*

(And see Misnomer, post.)

6. Misnomer of one of several defendants can be taken advantage of by plea in abatement only; it is no ground of nonsuit. *Rogers, assignee of Stokes,* v. *Boehm,* Henry *Nantes, and Taylor,* 2 Esp. 702. Kenyon, C. J. 1798.

Acc. Anon. Lutw. 10. *Rice* v. *Shute,* 5 Burr. 2611. S. C. 2 Bla. 695. *Dickinson* v. *Bowes,* 15 East, 110.

N. And one co-defendant cannot plead misnomer of his companion. Per Paston, Y. B. 21 H. 6, 37. *Shovel* v. *Evance,* Lutw. 35, 6. *Abraham* v. *Fellows,* 1 Wentw. 16, and see 1 Wentw. 9. 10. Y. B. 5 E. 4, 2 a. pl. 13.

7. Where a defendant avers that he was *baptized* by the name of A., he must produce direct proof of his *baptism,* though such an allegation is unnecessary. *Weleker* v. *Le Pelletier,* 1 Campb. 479. Ellenborough, C. J. 1808.

And see *Read* v. *Matteur,* Hardw. 286; 1 Wentw. 2.

(c) *Other action pending.*

8. A. whilst he is unlawfully imprisoned by B., is assaulted by C.—C. is guilty of the false imprisonment, and to an action for the assault; he may plead the pendency of an action against B. for the imprisonment. *Boyce* v. *Douglas*, 1 Campb. 60. Ellenborough, C. J. 1807.

And see *Warden* v. *Bailey*, 4 Taunt. 88. Sparry's case, 5 Co. 61; 2 Roll. Abr. Trespass V.

ACTION.

A. In what cases maintainable.

B. Notice of action.

C. Proper parties.

(a) *Plaintiff.*

(b) *Defendant.*

D. Joinder in action.

(a) *Plaintiffs.*

(b) *Defendants.*

E. Form of action.

(a) *Account, or assumpsit.*

(b) *Assumpsit, or covenant.*

(c) *Assumpsit special, or indebitatus.*

(d) *Replevin, or detinue.*

(e) *Replevin, or trover.*

(f) *Trespass, or case.*

F. Cross action.

A. In what cases maintainable. (And see Sheriff C.)

1. No action at law lies to enforce the payment of a legacy. *Farish* v. *Wilson*, Peake, 73. Kenyon, C. J. 1791.

S. P. Nicholson v. *Shirman*, 1 Sid. f. 45, 6. S. C. T. Raym. 23, 4; *Deeks* v. *Strutt*, 5 T. R. 690; *Mayor of Southampton*, v. *Greaves*, 8 T. R. 590, 3.

2. But an action will lie for withholding a specific legacy after assent. *Doe and Lord Say and Sele* v. *Guy*, executor, 4 Esp. 154. Ellenborough, C. J. 1802.

And the court of K. B. discharged a rule for a new trial; 3 East, 120.

3. A person is not liable to an action for harbouring a wife after notice, where she *represents herself* to have been ill-treated by her husband. *Philip* v. *Squire*, Peake, 82. Kenyon, C. J. 1791.

4. Where money in dispute is paid by consent to a stakeholder, no action can be supported between the original claimants, unless it be averred and proved, that the defendant prevented the plaintiff from receiving the money from the stakeholder. *Robson* v. *Hale*, Peake, 127. Kenyon, C. J. 1792.; Acc. *French* v. *Patton*, 9 East, 357.

5. A father may maintain an action for the battery of a son living in his house, and forming part of his family, without proof of actual service. *Jones* v. *Brown et alt.* Peake, 233, and 1 Esp. 217. Kenyon, C. J. 1794.

Sed vide *Gray* v. *Jeffries*, Cro. Eliz. 55.; *Barham* v. *Dennis*, *ibid.* 769, 70.; *Postlethwaite* v. *Parkes*, 3 Burr. 1878.; *Bennett* v. *Allcott*, 2 T. R. 166, 8.

6. No action will lie for an injury arising from the defendant's letting loose a fierce dog in his own yard for the protection of the premises at night. *Brock* v. *Copeland*, 1 Esp. 203. Kenyon, C. J. 1794.

7. But the owner is answerable for a mischief occasioned by keeping a fierce bull in a field over which there is a disputed right of way, where he has occasionally acquiesced in the exercise of such right. Anonymous, cited 1 Esp. 204. Kenyon, C. J. and K. B.

8. A plaintiff who omits to give evidence applicable to one of two distinct demands comprised in one declaration, and takes a verdict for the other demand only, is not thereby precluded from bringing a fresh action for the unsatisfied demand. *Seddon* v. *Tutop*, 1 Esp. 401. Kenyon, C. J. 1795.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 6 T. R. 607. And see *Hitchin* v. *Campbell*, 2 Bla. 827, S. C. 3 Wils. 304; *Bradford* v. *Bryan*, Willes, 268, S. C. 7 Mod. 349; *Ravee* v. *Farmer*, 4 T. R. 146; *Smith* v. *Johnson*, 15 East, 213. 8 Wentw. XXVI. Evidence, A (a) 2.

9. *It is stated to have been decided*, that a bankrupt cannot sue his assignees

for his allowance. *Groome* v. *Potts*. 1 Esp. 396. Kenyon, C. J. 1795. Sed vide S. C. 6 T. R. 548.

10. A. pretending to be executor to B. receives a debt from C.; B. in a compromise with A., allows this payment. *Semble*, that B. cannot *afterwards* sue C. for the amount. *Jones* v. *Booths*, 2 Esp. 600. Eyre, C. J. 1797.

11. But if the action be commenced *before* the making of the compromise, such compromise is no defence. *Ibid.*

12. Nor if made whilst B. was in prison at the suit of C. *Ibid.*

13. *Semble*, that where A. driving on the wrong side of a wide road is met by B., who forces himself between A. and the foot path, for the purpose *of asserting the right of the road*, B. is liable for any accident occasioned thereby. *Cruden* v. *Fentham*, 2 Esp. 685. Kenyon, C. J. 1798, and K. B. 1799.

14. If an English merchantman be seized *as prize* by a king's ship, an action at law cannot be maintained, though she be released without any proceedings in the Admiralty court, and though no probable cause be shewn. *Faith and another* v. *Pearson*, 4 Campb. 357. Holt, 113. Gibbs, C. J. 1815.

15. This is a good defence in trespass, under the general issue. *Ibid.*

And the court refused a rule to enter a nonsuit. *Ibid.* and 2 Marsh. 133.

16. A slave here continuing his service cannot sue for wages on an *implied* contract. *Alfred* v. *Marquis of Fitzjames*, 3 Esp. 3. Kenyon, C. J. 1800.

17. Consequential damages cannot be recovered for a seizure under an illegal warrant, if another action is pending against the party upon whose information the warrant issued. *Price* v. *Messenger*, 3 Esp. 96. Eldon, C. J. 1800. S. C. *not* S. P. 2 Bos. and Pull. 158.

18. A servant cannot sue his master for refusing a character. *Carrol* v. *Bird*, 3 Esp. 201. Kenyon, C. J. 1800.

19. Where a passenger removes to another vessel in consequence of an assault and imprisonment by the captain, he cannot recover the additional passage money as special damage, unless the injury continued to the period of the transhipment, or he could not remain on board with a reasonable regard to his own safety. *Boyce* v. *Bayliffe*, 1 Campb. 58. Ellenborough, C. J. 1807.

20. No action will lie on the judgment of a colonial court, if the defendant was never served with process, and never had an opportunity of defending the action; although it be the practice of that court to proceed to judgment upon a return of process, "served by nailing a copy of the declaration to the court-house door." *Buchanan* v. *Rucker*, 1 Campb. 63. Ellenborough, C. J. 1807.

And the Court refused a rule to set aside a nonsuit; 9 East, 192.

21. An action will lie upon a decree of the chancery in Jamaica, ordering the defendant to pay a definite sum to the complainant. *Sadler* v. *Robins*, 1 Campb. 253. Ellenborough, C. J. 1808.

22. In an action for negligence against a coach owner for overturning the plaintiff's wife, in consequence of which she lingered and died, the jury are to give damages with reference only to the injury sustained during the wife's illness. They cannot take into consideration the plaintiff's loss and grief on occasion of her death. *Baker* v. *Bolton*, 1 Campb. 493. Ellenborough, C. J. 1808.

Acc. Higgin's case, Noy's Rep. 18. Sed vide, I, 4. 5. 1. *Ibid.* 4. 5. 3. 2; Roll. Abr. 557. pl. 21; Anon. cited 1 Keb. 847. And see 1 Salk. 12.

23. In trespass, the death of plaintiff's wife may be shewn as evidence of the violent nature of the assault, but not in aggravation of damages. *Huxley* v. *Berg* 1 Stark. 98. Ellenborough, C. J. 1815.

24. An action lies against a person who discharges a gun so near an ancient decoy as to frighten away the wild fowl, though he do not fire into the decoy, or with intention to injure plaintiff. *Carrington* v. *Taylor*, 2 Campb. 258. Macdonald, C. B. Chelmsford, 1809.

And the court of K. B. refused a rule for setting aside verdict for the plaintiff; *ibid.* and 11 East, 571. And see *Keeble* v. *Hickeringill*, 11 Mod. 74, 130; Holt, 14; 3 Salk. 9; Bull. N. P. 79; S. C. *more fully reported*, 11 East, 574, n.

25. A judgment by *nil dicit* in the supreme court of Jamaica, in which it is alleged, that the defendant appeared by attorney, is *primâ facie* sufficient to sup-

port an action, without proof that the attorney was properly constituted by the defendant, or that the latter was within the jurisdiction of the colonial court. *Malony* v. *Gibbons*, 2 Campb. 502. Ellenborough, C. J. 1810.

26. The law implies no promise to repay a sheriff the expenses incurred in keeping possession under a *fi. fa.* ultimately abandoned on account of the refusal of an indemnity. *Bilke* v. *Havelock*, 3 Campb. 374. Ellenborough, C. J. 1813.

27. Nor will an action lie even where the defendant has recognized the claim by paying money on account. *Ib.*

28. A party injured by the sentence of an ecclesiastial court, exceeding its jurisdiction, may maintain an action against the judge. *Beaurain, gent.* v. *Sir W. Scott*, 3 Campb. 388. Ellenborough, C. J. 1813.

And see Doctor and Student, dial 2. cap. 32.

B. Notice of action.

(And see post, Attorney, pl. 5.)

29. A letter from an attorney, stating that he is instructed to take legal proceedings, unless a demand be complied with, is not a notice of action. *Lewis* v. *Smith*, Holt. 27. Gibbs, C. J. 1815.

C. Proper parties.

C. (a) *Plaintiff.*

(And see post, Trespass, pl. 17, 18.)

30. On the cutting down of timber on lands demised for years, the legal property vests in the reversioner, who alone can maintain trespass for an asportation. *Evans* v. *Evans*, 2 Campb. 491. Lawrence, J. Monmouth, 1810.

And see *Berry* v. *Herd*, Palm. 327; Cro. Car. 242; 7 T. R. 13; Selw. 1191.

31. A furniture broker, to whom goods are sent *on sale or return*, has a special property therein, which, coupled with the actual possession, will enable him to maintain trespass in his own name. *Colwill* v. *Reeves* 2 Campb. 575. Ellenborough, C. J. 1811.

32. And it is no defence, upon the general issue, that the goods were fraudulently mixed by the plaintiff with those of A. for the purpose of screening the goods of the latter, which the defendant had a right to take under a commission of bankrupt against him, unless the goods, when mixed, could not be distinguished. *Ibid.*

N. But the fraud may be pleaded specially. *Grome* v. *Grome*, Palm. 395. And see *Mayor of Carlisle* v. *Wilson*, 5 East, 2, 7; 2 Bla. Comm. 405.

33. A surviving partner may declare generally upon a contract entered into with him and his deceased partner, as a contract made with himself alone. *Ditchburn* v. *Spracklin and others*, 5 Esp. 31. Ellenborough, C. J. 1803.

Acc. *Richards* v. *Heather*, 1 B. and A. 29. Read's case, Sav. 92, pl. 171; Co. Litt. 37 b; Brereton et ux. v. — Noy's Rep. 135; 2 Vin. Abr. Actions (Joinder) D. d. pl. 16; *Hunt* v. *Hare*, Comb. 383. recognized, 2 T. R. 479. And see 1 Saund. 291, f. g. *Greenway* v. *Hornblow*, Hardress, 221; post Variance, pl. 39. F. N. B. 55 C., (b); *Holdwich* v. *Chafe*, Aleyn, 41; 5 Ves. 295. A surviving feoffee may plead a feoffment to himself without naming his joint feoffee; Co. Lit. 185, and cases there cited.

34. But a surviving lessor cannot recover on a count for *use and occupation* in which his deceased co-lessor is not named. *Lazarus* v. *Simmonds*. Abbott, J. London, 6 May, 1818.

S. C. By the name of *Israel* v. *Simmons*, 2 Stark 356. And the court refused a rule to set aside nonsuit on the ground that the plaintiffs should either have declared as surviving lessors, or have stated that the defendant was indebted to the plaintiffs for use and occupation, by the permission and sufferance of them and the deceased. *Ibid.*

Acc. 2 Saund. 121, n. 1; 2 M and S. 25 per Le Blanc, J. Acc. as to declaration *against* a surviving partner, *Tessard* v. *Warcup*, 2 Mod. 279, 280; *Spalding* v. *Mure*, 6 T. R. 363, 5.; Com. Dig. Abatement, F. 8.

35. If two agents enter into a contract

in their own names under a penalty, for the sale and purchase of an estate, *semble*, that an action on the contract must be brought in the name of one agent against the other. *The Duke of Norfolk* v. *Worthy*, 1 Campb. 337. Ellenborough, C. J. 1808.

36. But where the contract is rescinded, or cannot be performed, the deposit may be recovered by the vendee against the vendor, without shewing that the amount has been paid over. *Ibid.*

Acc. *Cary* v. *Webster*, 1 Stra. 480. And see *Flewellin* v. *Rowe*, 1 Bulst. 18; 2 Saund. 47 e.

37. A bargeman who carries malt between buyer and seller, may sue the former, on an implied undertaking to return them within a reasonable time *Terry* v. *Barker*, 2 Stark. 172. Ellenborough, C. J. 1817.

C. (b) *Defendant.*
(And see ante B. (a) pl. 34 n.)

38. If the owner or hirer of a carriage is driving it when an accident happens, a mere passenger is not liable. *Davey* v. *Chamberlain and another*, 4 Esp. 229. Ellenborough, C. J. 1802.

39. But where a carriage is hired by two persons, and used by them jointly, one is answerable for an injury occasioned by the unskilful driving of the other. *Ibid.*

40. If A. is riding on the wrong side of the road, but leaves convenient space for a carriage to pass him, and B. wantonly or negligently drive against him, the latter is responsible for the event. *Clay* v. *Wood*, 5 Esp. 44. Ellenborough, C. J. 1803.

41. A., jointly with others, employs B. to sink a sewer, which is left open; C. falls in. A. is liable to C., and may be sued alone; but he has his remedy over against B. *Sly* v. *Edgley*, 6 Esp. 6. Ellenborough, C. J.

D. Joinder in action.

D. (a) *Plaintiffs.*

42. Though articles of partnership give a new partner a share in past transactions, he cannot join in suing upon a contract made before he became a partner. *Wilsford et alt.* v. *Wood*, 1 Esp. 182. Kenyon, C. J. 1794.

43. The nonjoinder of a dormant partner is no ground of nonsuit. *Leveck and Pollard* v. *Shaftoe*, 2 Esp. 468. Kenyon, C. J. 1796.

S. P. Lloyd v. *Archbowle*, 2 Taunt. 324; *Mawman* v. *Gillett. Ibid.* 325, n.

44. A. demised to B., C., and D., jointly; B. and C., without the privity of A., released their interest to D., who had exclusive possession; A. distrained goods put upon the premises by E., who had notice of the release, for rent due from B., C., and D. It was *held* that a joint action would *not* lie against B., C., and D. for money paid by E. to redeem the distress. *Exall* v. *Partridge Jones, et alt.* 3 Esp. 8. Kenyon, C. J. 1796.

But the court of K. B. decided, that they were jointly liable, and set aside nonsuit. *Ibid. and* 8 *T. R.* 309.

And see *Jenkins* v. *Tucker*, 1 *H. Bla.* 90, 3. *Rex* v. *Inhabitants of Bridgwater*, 3 T. R. 550, 1 *Child* v. *Morley*, 8 T. R. 610, 4.

45. If several persons club for the purpose of buying coals to be divided in certain proportions amongst them, one member of the club cannot bring a separate action for the non-delivery of his allotment. *Everett, qui tam.* v. *Tindall*, 5 Esp. 169. Ellenborough, C. J. 1804.

46. By the usage of the herald's office, the herald and pursuivant in attendance, share the profits of business begun whilst they are jointly on duty. Held, that they may join in an action upon a contract for work and labour entered into with one of them. *Townsend and another* v. *Neale*, 2 Campb. 190. Ellenborough, C. J. 1809.

47. Three persons give their *joint and several* bond to the sheriff to indemnify him against an act in which they are *severally* interested. Two pay the whole. They cannot maintain a *joint* action against the third for a contribution. *Kelby and Vernon* v. *Steel*, 5 Esp. 194. Ellenborough, C. J. 1805.

Acc. *Brand* v. *Boulcott*, 3 Bos. and Pull. 235. And see *Graham* v. *Robertson*, 2 T. R. 282; *Osborne* v. *Harpy*, 5 East, 225, S. C. 1 Smith, 411.

D. (b) *Defendants.*

48. To charge A. and B. as partners, the record of an issue between A. and B.

directed for the purpose of trying the fact of the partnership, is evidence. *Whately* v. *Menheim and Levy*, 2 Esp. 608. Kenyon, C. J. 1797.

49. Where to a declaration on a joint contract, one of the defendants pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to the infant. He must discontinue, and commence a new action against the adult. *Chandler* v. *Parkes and Dankes*, 3 Esp. 76. Kenyon, C. J. 1800.

50. S. P. ruled in *Jaffray* v. *Frebain*, *Wilson and Black*, 5 Esp. 47. Ellenborough, C. J. 1803.

And see *Boulter* v. Ford, 1 Sid. 76. S. C. 1 Keb. 284. Blake's case, 1 Sid. 378; *Noke* v. *Ingham*, 1 Wils. 89; *Teed* v. *Elworthy*, 14 East, 210. 3 Taunt. 307.

51. Where three persons are sued jointly in trespass, the plaintiff can only recover for those injuries in which they were all concerned. *Aaron* v. *Alexander*, *Crowley*, *and Solomons*, 3. Campb. 35. Ellenborough, C. J. 1811.

Sed vide Tidd, 866, 7.

52. To entitle the plaintiff to proceed for an injury with which only one or two of the defendants are chargeable, he must suffer the rest to be acquitted. *Ibid.*

53. And in this case the judge will certify, under 8 and 9 Will. 3. cap. 11, that there was a reasonable cause for making them defendants. *Ibid.*

54. It is in the discretion of the judge whether he will direct the acquittal of a co-defendant, in tort, against whom no evidence has been given at the close of the plaintiff's case. *Davis* v. *Living*, *and others*. Holt 275. Gibbs, C. J. 1816.

55. Sheriff may sue two parliamentary candidates upon an *express* joint promise to pay the expense of certain preparations for the election. *Wathen* v. *Sandys and another*, 2 Campb. 640. Lawrence, J. Gloucester, 1811.

56. But *semble*, that where the nature of the preparations has not been previously settled, and no joint contract has been made, the sheriff must sue each candidate separately upon 18 Geo. 2. cap. 18. *Ibid.*

57. Persons dining together at a tavern, are jointly liable for the whole bill. *Foster* v. *Taylor*, *gent.* 3 Campb. 49. Ellenborough, C. J. 1811.

58. But *semble*, that officers messing together, are liable for their respective shares only. *Brown* v. *Doyle and others*, 3 Campb. 31. Ellenborough, C. J. 1811.

E. Form of Action.

E. (a) *Account*, *or assumpsit.*

(And see 2 Vin. Abr. 3. Keilw. 77 b.)

59. Held that the only remedy at law upon an account current between merchants is an action of *account*. *In assumpsit* the plaintiff will be nonsuited. *Scott* v. *M'Intosh*, 2 Campb. 238. Ellenborough, C. J. 1809.

S. P. *Lincoln* v. *Parr*, 2 Keb. 781. And see the distinction in *Farrington* v. *Lee*, 1 Mod. 269; *Wilkin* v. *Wilkin*, 1 Salk, 9; *Poulter* v. *Cornwall*, ibid; *Sandys* v. *Blodwell*, W. Jon. 401. See also *Ourston* v. *Ogle*, 13 East, 538. Beawes L. M. 50. Co. Litt, 146 a. But see *Tomkin* v. *Willshear*, 5 Taunt. 431, contra.

E. (b) *Assumpsit, or covenant.*

(And see Covenant, C.; Deed, A. 1. 2 Vin. Ab. 4.)

60. If a feme covert, without authority, contract with a servant by *deed*, the latter, after performing the service, may sue the husband in *assumpsit*. *White* v. *Cuyler*, 1 Esp. 200. Kenyon, C. J. 1794.

And the court of K. B. discharged a rule for setting aside a verdict for the plaintiff. *Ibid*, and 6 T. R. 176.

And see *Brown* v. *Benson*, 3 East, 333.

61. An indenture between A. and B. is executed by A. only. He cannot sue B. on the deed, but must bring *assumpsit*. *Sutherland* v. *Lishnam*, 3 Esp. 42. Eldon, C. J. 1799.

And see 2 Stra. 744, *Chesman* v. *Nainby*; *Brett* v. *Cumberland*, 3 Bulst. 163. 3d resolution.

E. (c) *Assumpsit, special, or indebitatus.*

(And see Bills and Notes, I. (d); Gaming, A. (a) 2 a; Vendor and Purchaser, C., D., F.)

62. Indebitatus assumpsit does not lie on a collateral promise to pay for goods sold to a third person. *Mines* v. *Sculthorpe*, 2 Campb. 215. Ellenborough, C. J. 1809.

Sed vide Plowd, 183. Vide etiam, 1 Saund. 211 a, b.

63. Where goods sent *on sale or return* are not returned within a reasonable time, the value may be recovered in an action for goods sold and delivered. *Bailey* v. *Gouldsmith*, Peake 56. Kenyon, C. J. 1791.

64. Where goods are sold at credit, and the vendor discovers that the purchase is fraudulent, he may sue the vendor without waiting the expiration of the credit. *De Symens* v. *Minchwick*, 1 Esp. 430. Eyre, C. J. 1795.

65. If the vender of an estate have not such a title as, by the conditions of sale, he engaged to make to the purchasers, the latter may recover back the deposit without declaring on the special contract. *Farrer* v. *Nightingale*, 2 Esp. 640. Kenyon, C. J. 1798.

And see *Johnson* v. *Johnson*, 3 Bos. and Pul. 162, 6; *Cripps* v. *Read*, T. R. 606; *Giles* v. *Edwards*, 7 T. R. 181.

E. (d) *Replevin, or detinue.*

(See REPLEVIN, post.)

E. (e) *Replevin, or trover.*

(See REPLEVIN, post.)

E. (f) *Trespass, or case.*

(And see Fitz Trespas, 241, 4; 2 Vin. Abr. 1, 6; 2 Saund. 47 k; F. N. B. 168 c; ib. 173 E. note (a); ib. 178 H.)

66. If A. even carelessly drive against B.'s horse, it is *trespass*. *Sheldrick* v. *Abery*, et alt. 1 Esp. 55. Kenyon, C. J. 1793.

67. *Ruled*, that if A. lay hold of B. and give him in charge to a constable on a mistaken suspicion of felony, B. may maintain *case*, but not *trespass* against A. *Stonehouse* v. *Elliott*, 1 Esp. 272. Kenyon, C. J. 1795.

But the court of K. B. discharged a rule for setting aside a verdict which had been taken nominally only, for the plaintiff in *trespass*, 6 T. R. 315.

And see *Samuel* v. *Payne*, Dougl. 358; *Morgan* v. *Hughes*, 2 T. R. 351; Caldecott, 291; Burn's Justice, tit. Arrest. Post DEFAMATION, D. F. N. B. 173. (n) a.

68. In trespass for driving against the plaintiff, it is necessary to shew that the defendant was himself driving. *Leame* v. *Bray*, 5 Esp. 18. Ellenborough, C. J. 1803.

And see *M'Manus* v. *Cricket*, 1 East, 106; *Huggett* v. *Montgomery*, 2 N. R. 446.

69. If the carriage were driven by a servant, the remedy against the master would be case. *Leame* v. *Bray*, ubi supra.

70. It will not be presumed that the master was driving. *Ibid.*

S. C. not S. P P. 3 East, 598.

71. A.'s horses are hired by B.; C. drives a cart against them; A.'s remedy is *case* for the injury done to his reversionary interest. *Hall* v. *Pickard*, 3 Campb. 187. Ellenborough, C. J. 1812. Acc. *Gordon* v. *Harper*, 7 T. R. 9.

72. But a stable keeper who lets out a chaise and horse, driven by his own servant, has such a possession as will enable him to maintain *trespass* for an injury done even by the hirer. *Dean* v. *Branthwaite*, 5 Esp. 35. Ellenborough, C. J. 1803.

73. *Case*, for injuring the plaintiff's reversionary interest, lies for voluntary waste committed by the tenant after the expiration of a notice to quit. *Burchell* v. *Hornsby*, 1 Campb. 360. Ellenborough, C. J. 1808.

74. Though *trespass* will also lie. *Ibid.* And see *Taunton* v. *Costar*, 7 T. R. 431; *Davis* v. *Connop*, 1 Price, 53.

75. *Trespass* may be maintained by A. the owner of one vessel, against the owner of another, who is himself at the helm, and by whose unskilful steering, A.'s vessel is unintentionally run down. *Covell* v. *Laming*, 1 Campb. 497. Ellenborough, C. J. 1808.

Acc. *Leame* v. *Bray*, 3 East, 593. Contra *Rogers* v. *Imbleton*, 2 N. R. 117. And see *Huggett* v. *Montgomery*, 2 N. R. 446.

76. Though by 11 Geo. 2. cap. 19. s. 19. a party aggrieved by an irregular distress may recover full satisfaction for the special damage in an action of trespass, *or* on the case *at the election of the plaintiff*, trespass will not lie where the irregularity consists merely in *nonfeasance*. *Messing* v. *Kemble*, 2 Campb. 115. Ellenborough, C. J. 1808.

77. S. P. admit: *per tot. cur.*; and, that trespass will lie for continuing on the premises after the five days given by

9 W. and M. st. 1 cap. 5. per Le Blanc and Bayley, J. J. *Winterbourne* v. *Morgan*, 2 Campb. 117, and 11 East, 395. K. B. T. T. 1808.

78. Where an injury has been received from the immediate, though unintentional, wrongful act of the defendant, the remedy is *trespass*, not *case*. *Lotan* v. *Cross*, 2 Campb. 465. Ellenborough, C. J. 1810.

79. And this doctrine having been settled in the case of *Leame* v. *Bray*, 3 East, 393, the court will not suffer the same point to be raised *upon a motion for a new trial*, grounded upon a contrary decision in C. P. S. C. in K. B. M. T. 1810. *Ibid.*

N. See *Huggett* v. *Montgomery*, 2 N. R. 446.

80. A count for an assault upon the plaintiff may be joined with a *servitium amisit*. *Ditcham* v. *Bond*, 3 Campb. 526, n; K. B. E. T. 1814.

81. A. having recovered against B., for driving holdfasts into A.'s wall, to support a nuisance, should declare in case for the *continuance* of the injury. *Lawrence* v. *Obee*, 1 Stark. 22. Ellenborough, C. J. 1815.

82. The putting out of a board which overhangs A.'s land, will not entitle A. to an action of *trespass*. *Pickering* v. *Rudd*, 4 Campb. 219. 1 Stark. 56. Ellenborough, C. J. 1815.

F. Cross action.

83. In an action against an artist for unskilfully varnishing prints, the production of the record of a judgment at his suit, against the owner for work and labour generally, is no defence. *Sintzenick* v. *Lucas*, 1 Esp. 43. Kenyon, C. J. 1793.

84. Although the former cause of action be identified with the present transaction, and it be shewn that no objection was then made on the score of the imperfection of the workmanship. *Ibid.*

85. But in a subsequent case, where a merchant had recovered damages against his factor, for sending an article of quality inferior to order, it was held, that the factor could not maintain a cross action for his commission; for this claim might have been urged in reduction of damages in the former action. *Kist and others* v. *Atkinson and others*, 2 Campb. 63. Ellenborough, C. J. 1809.

And see post Agent, 21.; Assumpsit, B.; Conditions A. 1, 2; Pleading C. (c).

And for cases of *recouper*, see 18 Vin. Abr. Rent. (H c) pl. 2, & N. B. 58 H.

86. The non-compliance with a covenant to sail by the first wind, cannot be set up as an answer to an action for freight, or be given in evidence in mitigation of damages. It must form the subject of a cross action. *Bornman* v. *Tooke*, 1 Campb. 377. Ellenborough, C. J. 1808.

87. So, damage occasioned by bad stowage; *Sheels* v. *Davies*, 4 Campb. 119. Ellenborough, C. J. 1814.

But see Assumpsit, B.

ACTION ON THE CASE.

A. Torts to persons.
- (a) *Criminal conversation.*
- (b) *Harbouring wives.*
- (c) *Seducing daughters.*
- (d) *Enticing away servants.*
- (e) *Keeping mischievous animals.*
- (f) *Using dangerous instruments.*
- (g) *Malicious arrest.*
- (h) *Malicious prosecution.*
- (i) *Misfeasance in driving carriages.*

B. Torts to personal property.
- (a) *Misfeasance in steering ships.*
- (b) *Nonfeasance.*
- (c) *Obstruction of plaintiff's trade.*
- (d) *Misrepresentations of solvency.*
- (e) *Deceit in sales.*
- (f) *Perjury.*

C. Torts to real property.
- (a) *Obstruction of ways.*
- (b) *Obstruction of windows.*
- (c) *Nuisance to water courses.*
- (d) *Negligence in enclosing buildings.*
- (e) *Injury to reversionary interest.*

A. Torts to persons.

A. (a) *Criminal conversation.*

(And see Baron and Feme, A. (a) 5, 11.)

1. Qu. Whether an action for crim.

con. will lie where the parties are separated by mutual consent. *Hodges* v. *Windham*, Peake, 39. Kenyon, C. J. 1791.

2. An action for crim. con. cannot be maintained by a man who has permitted his wife to carry on an illicit intercourse, although not with the defendant. *Ibid.*

And see 2 Inst. 436; Sed vide *ibid.* 435; Co. Litt. 32 a. n 10; Fitz. N. B, 89, O.

3. *Semble*, that no action lies for an act of adultery committed after the husband and wife are separated. *Weedon* v. *Timbrell*, 1 Esp. 16. Kenyon, C. J. 1793.

And the court of K. B. discharged a rule for a new trial; 5 T. R. 357.

4. S. P. ruled in *Bartelot* v. *Hawker*, Peake 7. Kenyon, C. J. 1790.

Sed vide *Chambers* v. *Caulfield*, 6 East, 244, 9, 54; S. C. 2 Smith, 356, 65.

5. A master, upon the seduction of his servant, may recover damages beyond the mere loss of service, though he be not related to her. *Fores* v. *Wilson*, Peake, 55. Kenyon, C. J. 1791.

And see *Irwin* v. *Dearman*, 11 East, 23.

6. In an action for crim. con. evidence of the wife's misconduct with others, previously to the commission of the act for which the action is brought, is admissible in mitigation of damages. *Elsam* v. *Fawcett*, 2 Esp. 562. Kenyon, C. J. 1797.

7. Or a letter from her, enticing the defendant into the connection. *Ibid.*

And see *Gardiner* v. *Jadis*, Selw. N. P. 25. Hodgson's case, Phill. Ev. 140.

8. But *subsequent* acts of misconduct are not admissible. *Ibid.*

9. An *unsuccessful* attempt by the defendant to impeach the husband's character, will not entitle the latter to call witnesses in support of his character. *King* v. *Francis*, 3 Esp. 116. Kenyon, C. J. 1800.

10. A witness may be called by the husband to prove the representation made to him by the wife on leaving his house for the purpose of rebutting a suspicion of connivance in her elopement. *Hoare* v. *Allen*, 3 Esp. 276. Kenyon, C. J. 1801.

11. Where the husband and wife necessarily live apart, letters expressive of their attachment may be read to increase the damages, provided it can be distinctly shewn that they were written at a time when there was no suspicion of misconduct. *Edwards* v. *Crock*, 4 Esp. 39. Kenyon, C. J. 1801.

12. In this action letters written between husband and wife are admissible without shewing why they lived apart, if there be some evidence that were not written subsequently to their date. *Trelawney* v. *Colman*, 2 Stark. 191. Holroyd, J. 1817.

And the court refused a rule for a new trial. *Ibid.*

13. And *semble*, it is sufficient for the purpose of proving this, if a witness recollects the contents of a letter written about the time, and corresponding in substance with the one produced. *Ibid.*

14. So a witness may speak of the judgment she formed, from the wife's expressions and conduct, of her affection at the time. *Ibid.*

15. *Ruled*, that an action for crim. con. could not be maintained by a husband, who, at the time of the injury, was living in open adultery. *Wyndham* v. *Lord Wycombe*, 4 Esp. 16. Kenyon, C. J. 1801.

16. S. P. *Strutt* v. *Marquis of Blandford*. *Ibid.*

17. But in a subsequent case it was held, that the misconduct of the husband went only in mitigation of damages. *Bromley* v. *Wallace*, 4 Esp. 237. Alvanley, C. J. 1802.

18. And that nothing short of *consent* was a bar to the action. *Ibid.*

And see *Hoare* v. *Allen*, Selw. 12; *Colley* v. *Cibber*, *ibid.* and Bull. N. P. 27; *Duberley* v. *Gunning*, 4 T. R. 655.

19. If A. recover against B. in an action for crim. con. he is not precluded from suing C., who appears to have carried on an illicit intercourse with the wife during the same period. *Gregson*, *one*, *&c.* v. *M'Taggart*, 1 Campb. 415. Ellenborough, C. J. 1808.

A. (b) *Harbouring wives.*

20. Where a woman is compelled by ill-treatment to leave her husband's house any person may receive and pro-

tect her. *Berthon* v. *Cartwright*, 2 Esp. 480. Kenyon, C. J. 1796.

And see *Bamfield* v. *Massey*, infra 21.

21. And it is sufficient if the wife *represent herself* to have been ill-treated. *Philip* v. *Squire*, Peake, 82.

Vide Y. B. 20 H. 7. 2. b.; *Rex* v. *Wiseman*, 2 Smith, 617, 8.

As to this action, see Y. B. 1 E. 4. 1. a; *Winsmore* v. *Greenbank*, Willes, 577; F. N. B. 51 K.

A. (c) *Seducing daughters, &c.* (And see Trespass A.)

22. Where a father permits a person, who has confessed that he is a married man, to continue his visits as a suitor to his daughter upon an alleged probability of a divorce, or of the death of the wife, an action for seduction cannot be maintained. *Reddie* v. *Scoolt*, clerk, Peake, 240. Kenyon, C. J. 1794.

23. In this action the plaintiff may give evidence of the general good conduct of his family, and of the number of his other children in aggravation of damages. *Bedford* v. *M'Kowl*, 3 Esp. 119. Eldon, C. J. 1800.

24. But he cannot shew the servant's general character for chastity, unless that character have been impugned on the other side. *Bamfield* v. *Massey*. 1 Campb. 460. Ellenborough, C. J. Maidstone, 1808.

And see *King* v. *Francis*, ante A. (a) 8.

25. An attempt to impugn the character of the servant on his cross-examination is not sufficient. Dodd v. Norris, 3 Campb. 519. Ellenborough, C. J. 1814.

26. And it is not sufficient that the defendant has attempted to prove a single act of unchastity before her acquaintance with him, if no evidence of *general* bad character have been offered. *Bamfield* v. *Massey*, ubi supra.

And see *Clarke* v. *Periam*, 9 Mod. 340, 6.

27. Evidence that the defendant prevailed by means of a promise of marriage is inadmissible. *Dodd* v. *Norris*, ubi supra.

28. Where a defendant has confessed the seduction, it is unnecessary to produce the party seduced, though the withholding of her is open to observation. *Farmer* v. *Joseph*, Holt. 451. Wood B. York, 1816.

And the court refused a rule for a new trial, upon the ground of excessive damages. *Ibid.*

Parker v. *Langley*, 10 Mod. 202; *Fisher* v. *Bristow*, Doug. 215.

A. (d) *Enticing away servants.*

29. No action lies for engaging a servant from the expiration of the period for which he is hired, though he had no intention of quitting his master's service. *Nichol et alt* v. *Martyn*, 2 Esp. 732, 4. Kenyon, C. J. 1799.

As to employing servants *during* the term of their engagement, see Adams and Bafield's case, 1 Leon, 240; *Fawcet* v. *Beavres et ux.* 2 Lev. 63; *Regina* v. *Daniel*, 1 Salk, 380; *Hart* v. *Aldridge*, Cowp. 54; *Blake* v. *Lanyon*, 6 T. R. 221; Vin. Abr. Master and Servant, O. *Ibid.* R. 6 marg.; *ibid.* R. 7; Bac. Abr. Master and Servant, O.; 1 Danv. Abr. 201; Fitz. Abr. Trespass, 182; 2 Roll. Abr. Trespass, 556 pl. 11, 12, 13; F. N. B. 92 K. (a); *ibid*, 168 C. D. notes a., b., c.

A. (e) *Keeping mischievous animals.* (And see Trespass, B. 2.)

30. Common report that a dog has been bitten by a mad dog, is sufficient to make it the duty of the owner to confine him. *Jones* v. *Perry*, 2 Esp. 482. Kenyon, C. J. 1796. S. C. Peake's L. Ev. 292.

31. And it is said to have been ruled, that the owner of a fierce and unruly dog, is bound to secure him *without notice*. *Ibid.*

32. But it has since been held, that it is not sufficient to shew that the dog was fierce, and usually tied up, and that after the injury the defendant promised satisfaction. *Beck and wife* v. *Dyson*, 4 Campb. 198. Ellenborough, C. J. 1815. And see 2 Stark. 214. note (b).

33. Held that a declaration which avers that the dog was accustomed to bite sheep, is supported by his having chased sheep and jumped at a man. *Hartley* v. *Halliwell*, 2 Stark. 212. and Holt. 617; Wood B. Carlisle, 1817.

But the court of K. B. set aside the verdict found for the plaintiff. 2 Stark. 212. *Mason* v. *Keeling*, 12 Mod. 332. S. C. differently reported. 1 Lord Raym, 606; *Bayntine* v. *Sharp*, 1 Lutw. 90. *Buxendine* v. *Sharp*, 2 Salk, 662;

Smith v. *Pelah*, 2 Stra. 1264. ante, p. 2. § 5, 6.

A. (f) *Using dangerous instruments.*

34. A party who entrusts a gun to indiscreet hands must render it perfectly innoxious. * *Dixon* v. *Bell*, 1 Stark. 287. Ellenborough, C. J. 1816.

35. Held that in the estimate of special damage, surgeon's bill, though unpaid, may be taken into account, but physician's fees not, unless paid, for they are not recoverable. *Dixon* v. *Bell*, 1 Stark. 287. Ellenborough, C. J. 1816.

A. (g) *Malicious arrest.*

36. In this action it is not sufficient to prove the affidavit, the writ *returned cepi corpus*, the actual arrest, and judgment of *non pros.* To shew that the arrest was made under the defendant's writ, it is necessary to prove the *warrant*, *Lloyd* v. *Harris*, Peake, 174. Kenyon, C. J. 1793.

And see *Drake* v. *Sykes*, 7 T. R. 113. Post Trespass, B.; Sheriff C.

37. To shew the former suit determined, *semble*, that it is not sufficient to produce the judge's order to stay proceedings upon payment of costs, and to prove that the costs were paid accordingly. *Kirk* v. *French*, 1 Esp. 80. Kenyon, C. J. 1794.

Acc. *Barton* v. *Mills*, Cases temp. Hardw. 125, 6. And see *Goddard* v. *Smith*, 1 Salk, 21. S. C. 2 Salk, 456. S. C. more fully reported, 6 Mod. 262.

38. But the production of the rule of court to discontinue, with proof of the taxation and payment of costs, is sufficient. *Bristow* v. *Haywood*, 3 Campb. 213. 1 Stark. 48. Ellenborough, C. J. 1815.

39. Although it be averred that the plaintiff was detained until he found bail, any detention under the arrest will support the action. *Ibid.*

40. The discontinuance of an action on a bill, in respect of which the party had been previously discharged by the laches of the plaintiff, is not sufficient to raise the presumption of malice. *Ibid.* 1 Stark. 48.

41. It lies upon the plaintiff to fix the defendant with full knowledge that the sum sworn to was not due. The circumstance of his taking a less sum out of court is not sufficient. *Jackson* v. *Burleigh*, 3 Esp. 34. Kenyon, C. J. 1799.

N. Nor is a judgment of Nonpros. *Sinclair* v. *Eldred*, 4 Taunt. 7.

42. Declaration stated, that B., the now defendant, had no cause of action, to the amount of 10*l.*, against A., the now plaintiff. It appeared that B. had a demand of 12*l.*, but that he had held A. to bail for a much larger sum. The trial was suffered to proceed by Gould, J.; but the court of K. B. set aside a verdict for the plaintiff. *Wilkinson* v. *Mawbey*, *bart.* cited 1 Campb. 297.

43. But where, upon a similar declaration, it appeared that B. had a demand against A. for 100l. for a different cause of action from that expressed in the affidavit, but was indebted to A. in a greater amount upon the balance of accounts, it was held that A. might recover. *Wetherden* v. *Embden*, 1 Campb. 295. Mansfield, C. J. 1808.

And B. having moved in arrest of judgment, on the ground that the manner in which the suit had ended was not properly shewn, the court ruled that as it was averred that the suit was ended, it was unnecessary to state the manner; 2 Chitty on Pleading, 294. note (e). 2d edition, S. C. And see 3 Lord Raym. 300; Morg. Prec. 404. Quære tamen, whether it should not appear that the first action had terminated in favour of the now plaintiff; see Y. B. 2 R. 3. 9. pl. 22; Dyer, 284; *Arundell* v. *Tregons*, Yelv. 117; *Parker* v. *Langly*, 10 Mod. 145, 209; S. C. Gilb. Cases, 163; *Hunter* v. *French*, Willes, 520. n; *Fisher* v. *Bristow*, Dougl. 215; *Morgan* v. *Hughes*, 2 T. R. 225. That the omission would have been fatal on demurrer; see *Blackgrave* v. *Oden*, 2 Vin. Abr. Action Case, 35 pl. 23 marg. See also *Skinner* v. *Gunter*, 1 Saund. 229, 2d point.

44. Where cross demands are *separate and distinct*, and A. to whom the larger sum is due, arrests B. for the *balance* only, and B. arrests A. for the smaller sum due to himself, no action will lie for the second arrest. *Brown* v. *Pigeon*. 2 Campb. 594. Ellenborough, C. J. 1811.

N. *Secus*, where the accounts are mutual *and unliquidated*. Turlington's case, 4 Burr. 1996; Fidd, 176. And

see *Middleton* v. *Hill*, 1 M. and S. 240.

45. Such a vexatious proceeding was, however, considered a fit subject for a summary application to a judge, who ordered the proceedings in the former action to be stayed upon the payment of the balance and costs, and the latter to be stayed *without costs*. *Ibid.*

46. B., after taking A.'s bail in execution, issued a test, *ca. sa.* upon a pleader's opinion, and a reported case, under which A. was detained in custody till discharged, by rule of court (2 M. and S. 341). Held that here was ignorance only, and no malice. *Snow* v. *Allen*, 1 Stark. 502. Ellenborough, C. J. 1816.

47. Defendant sued plaintiff by mistake. The officer demanded payment, but, on the plaintiff's denying the debt, said he would inquire into the matter. The mistake being discovered, the plaintiff was told that he need give himself no further trouble. The plaintiff, however, chose to give money to the bailiff, and put in bail above. *Held*, that no action could be maintained. *Bieten* v. *Burridge and others*, 3 Campb. 139. Ellenborough, C. J. 1811.

Acc. *Arrowsmith* v. *Le Mesurier*, 2. N. R. 211.

48. In an action for a malicious arrest on a charge of larceny, defendant cannot give in evidence that plaintiff's character was suspicious. *Newsam* v. *Carr*, 2 Starkie, 69 Wood B. 1817.

49. In the estimate of damages, the costs incurred by plaintiff should be reckoned as between attorney and client. *Sandback* v. *Thomas*, 1 Stark. 306. Ellenborough, C. J. 1816.

A. (h) *Malicious prosecution.*

50. Defendant indicted plaintiff for an assault, *having struck the first blow himself*. This circumstance alone will not support an action. *Fish* v. *Scott*, Peake 135. Kenyon, C. J. 1792.

51. After giving evidence of probable cause, the defendant may shew that the plaintiff was a man of bad character; but he cannot enter into particular facts. *Rodriguez*, v. *Tadmire*, 2 Esp. 721. Kenyon, C. J. 1799.

52. A charge of felony is not justifiable where there has been a taking under a [illegible], though tortious. *Wallace* v. *Jarman*, 2 Stark. 162. Ellenborough, C. J. 1817.

53. So evidence that the defendant stated facts, amounting to a *tortious conversion* only, upon which a magistrate caused the plaintiff to be apprehended *on suspicion of felony*, will not support a count for *im*[illegible]*ng the crime of felony*. *Leigh* v. *Webb*, [illegible] Esp. 165. Eldon, C. J. 1800.

54. And *semble* that no action can be maintained in such case. *Ibid.*

And see Anon. Moore 6, pl. 22; *Mure* v. *Kay*, 4 Taunt. 34; *Haynes* v. *Rogers*, [illegible] 282.

[illegible] But an averment of a charge of felony made before a magistrate, is supported by proof of a charge *upon suspicion only*. *Davis* v. *Noak*, 1 Stark. 377. Ellenborough, C. J. 1816.

And the court discharged a rule for a new trial. *Ibid.*

56. Upon an indictment for felony, the jury pause before they acquit the prisoner; but he is not called upon for his defence. This is evidence of probable cause. *Smith* v. *Macdonald*, 3 Esp. 7. Kenyon, C. J. 1799.

And see *Lilwal* v. *Smallman*, Selw. 946; *Golding* v. *Crowle*, Bull. N. P. 14.

57. *Positive* evidence must be given of the absence of probable cause. Therefore where the plaintiff has been indicted for perjury, it is not sufficient to shew, that he was acquitted for want of prosecution, that the facts lay peculiarly within the knowledge of the defendant, and that the indictment contained many frivolous assignments of perjury, there being one substantial charge. *Purcel* v. *M'Namara*, 1 Campb. 199. Ellenborough, C. J. 1808.

And the court of K. B. refused a rule for setting aside nonsuit; *ibid.* and 9 East, 361. And as to the second point, see *Parry* v. *Fishwick*, Bull. N. P. 14; better reported 9 East, 362 n.

58. A., as attorney for B., sues C. in the exchequer. C. indicts A. and B. for conspiracy. Upon being acquitted, A. brings an action against C., and proves that the suit in the exchequer was well founded, and that C. did not appear to prosecute his indictment. This is not sufficient to throw on C. the burthen of shewing a probable cause. *Sykes* one

&c. v. *Dunbar*, 1 Campb. 202. n. Kenyon, C. J. 1799.

59. Nor is the abandonment of a prosecution *coupled with evidence of express malice*, sufficient to throw this burthen on the defendant. *Incledon* v. *Berry (Bury) and others*, 1 Campb. 203, n. Le Blanc, J. Exeter, 1805.

60. Nor the omission to prefer an indictment after a charge on oath of an assault. *Wallis* v. *Alpine*, 2 Campb. 204, n. Ellenborough, C. J. 1805.

A. (i) *Misfeasance in driving carriages.*

(And see Witness, C. (k))

61. The driver of a carriage is not bound to keep the left side of the road, provided he leaves sufficient room for other carriages, &c. that may meet him on their proper side. *Wardsworth* v. *Willan and others*, 5 Esp. 273. Rooke, J. 1805.

62. The driver of a stage coach, where the way lies under a low, and almost impassable, gateway, is bound to inform the outside passengers of the full extent of their danger. *Dudley* v. *Smith*, 1 Campb. 167. Ellenborough, C. J. 1808.

And see *Brucker* v. *Fromont*, 6 T. R. 661.

63. A passenger being alarmed, leaped off and broke his leg. Left to the jury to consider—1st, Whether the alarm was consequent upon any default of defendant—2dly, Whether the alarm was reasonable. *Jones* v. *Boyce*, 1 Stark. 493. Ellenborough, C. J. 1816. Verdict for plaintiff.

64. A coachman, when there is no other carriage on the road, may drive in what part of it he thinks proper. Under such circumstances, therefore, he is not responsible for the consequences of an accident which would not have arisen if it had happened that he had kept the left side of the road. *Aston* v. *Heaven and another*, 2 Esp. 533. Eyre, C. J. 1797.

65. Proof that a stage coach broke down, and that the plaintiff, a passenger, was greatly bruised, is sufficient to raise the presumption that the accident arose either from the unskilfulness of the driver, or the insufficiency of the coach. *Christie* v. *Griggs*, 2 Campb. 79. Mansfield, C. J. 1809.

66. If the driver do not take the safest possible course, the owner is responsible for the mischief which ensues. *Jackson* v. *Tollett*, 2 Stark. 37. Ellenborough, C. J. 1817.

67. Though driving on his own side of the road. *Mayhew* v. *Boyce*, 1 Stark. 423. Ellenborough, C. J. 1816.

B. Torts to personal property.

B. (a) *Misfeasance in steering ships.*

68. A pilot steering a ship is liable for an injury occasioned by his own misconduct, notwithstanding a superior officer is on board. *Stort* v. *Clements*, Peake, 107. Kenyon, C. J. 1792.

And see *Nicholson* v. *Mounsey*, 15 East, 384.

B. (b) *Nonfeasance.*

(And see post Agent, C. (a); Indictment (a); F. N. B. 183. N. note (a).)

69. An action on the case will lie against the owner of a lighter sunk in the Thames, who neglects to place a buoy over the spot, for damage done to a barge by striking against it, though the bargeman was *verbally* warned of the danger by a person placed there by the defendant for that purpose. *Harmond* v. *Pearson*, 1 Campb. 517. Ellenborough, C. J. 1808.

And see Rivers, 3.

70. *Semble*, that a party licensed to let horses is under no legal obligation to furnish them. *Dicas* v. *Hides*, Holt. 207. 1 Stark. 247. Le Blanc, J. Lancaster, 1816.

B. (c) *Obstruction of plaintiff's trade.*

71. An action lies against the master of a vessel for purposely firing at the natives on a foreign coast, and thereby preventing them from trading with the plaintiff. *Turleton and others*, v. *M'Gawly*, Peake, 205. Kenyon, C. J. 1793.

72. Although it appear that the defendant had not conformed to the laws of that country, by paying a duty imposed upon licences to trade. *Ibid.*

73. A. cannot maintain an action for a libel upon B., whereby the latter was deterred from singing at A.'s theatre, to the diminution of his profits. *Ashley*

v. *Harrison*, Peake, 194, and 1 Esp. 48. Kenyon, C. J. 1793.

74. A person engaged by the manager of a theatre as a public singer, is beaten, and is thereby prevented from performing. The manager cannot sue for the remote injury which he sustains. *Taylor* v. *Neri*, 1 Esp. 386. Eyre, C. J. 1795.

B. (d) *Misrepresentations of solvency.* (And see WITNESS C. (n.) 16.)

75. An action will not lie upon a misrepresentation of the circumstances of a customer, unless it be shewn that the defendant intended to impose on the plaintiff individually; and also that the plaintiff acted upon his information. *Scott and another* v. *Lara*, Peake, 226. Kenyon, C. J. 1794.

And see *Ibbottson* v. *Rhodes*, 2 Vern. 554.

76. No action therefore will lie upon a misrepresentation, if the plaintiff *or his agent* had notice of the insolvency of such customer. *Cowen et alt.* v. *Simpson*, 1 Esp. 290. Kenyon, C. J. 1795.

77. In an action for a misrepresentation of the solvency of a customer, evidence of a similar misrepresentation made to a third person is admissible, to shew the fraudulent connexion between the defendant and the customer. *Beal* v. *Thatcher*, 3 Esp. 194. Kenyon, C. J. 1800.

78. If a creditor arrests his debtor upon a suspicion of misconduct which he afterwards finds to be unfounded, he is not bound to disclose the transaction to a person who applies for information respecting the character and credit of such debtor. *Wood* v. *Wain*, 1 Esp. 442. Kenyon, C. J. 1796.

79. A. is referred to B., by C., for his character; B., upon being interrogated generally, without reference to the qualities of the goods, or the proposed mode of dealing, makes a deceitful representation of C.'s circumstances. No action will lie against B., if C. pays for the goods which it was originally in contemplation to sell; although C. become insolvent within a few months, indebted to A. for a subsequent parcel of goods. *De Graves* v. *Smith*, 2 Campb. 533. Ellenborough, C. J. 1810.

80. It *might* have been otherwise, if, as in *Hutchinson* v. *Bell*, 1 Taunt. 558, A. had stated, that he proposed opening an account with C. as a *general customer. Ibid.*

81. Or if there had been a conspiracy to defraud A., by paying for the first parcel of goods. *Ibid.*

82. To support this action, the representation must be fraudulent as well as false. *Ashlin* v. *White*, Holt. 387. Gibbs, C. J. 1816.

S. P. *Haycraft* v. *Creasy*, 2 East, 92. And see *Vernon* v. *Keys*, 12 East, 632; S. C. 4 Taunt. 488.

83. The person whose solvency has been misrepresented is a competent witness. *Smith* v. *Harris*, 2 Stark. 47. Ellenborough, C. J. 1817.

B. (e) *Deceit in sales.*

84. This action lies, notwithstanding a collateral agreement, to exchange the article if disliked. *Wallace* v. *Jarman*, 2 Stark. 162. Ellenborough, C. J. 1817.

85. Vendee may maintain an action against vendor for a fraudulent misrepresentation, after having paid the price of the goods under legal process. *Jendwine* v. *Slade*, 2 Esp. 572. Kenyon, C. J. 1797.

Acc. Dict. per Eyre, C. J. in *Philips* v. *Hunter*, 2 H. Bla. 415, 6.

And see post ASSUMPSIT E. (b) (g)

B. (f) *Perjury.*

86. An action will lie against a witness who falsely denies his having possession of a paper which he has been subpœnaed to produce. *Amey* v. *Long*, 1 Campb. 16. Ellenborough, C. J. 1807.

87. The party injured is not compelled to proceed criminally for the perjury. And the court of K. B. refused a rule to set aside nonsuit. *Ibid.*

Cont. 1 Roll. Ab. 33, l. 33, *Aier* v. *Redgwit*, S. C. Palmer, 142. And see *Westbrooke* v. *Strutville*, 1 Stra. 79; Bull. N. P. 21; 1 Vin. Abr. Actions, C. (a); F. N. B. 115 E.; *ibid.* 116 D.; Fitz. Abr. Proces 20; Acc. Hamper's case, 2 Leon. 211.

Acc. Y. B 27 H. 8, 27; 5 Co. 73. And see Vaughan, 340; *Russell* v. *Men of Devon*, 2 T. R. 667.

C. Torts to real property.

C. (a) *Obstruction of ways.*

(And see F. N. B. 183 N. *Ibid*, note (a).)

88. Held that case for obstructing a highway does not lie without special damages actually incurred. *Hubert* v. *Grove*, 1 Esp. 148. Kenyon, C. J. 1794.

89. It is not sufficient that from the situation of the plaintiff's premises, he must have been particularly affected by the obstruction. *Ibid.*

Contra *Rose* v. *Miles*, M. & S. 101, and see *Iveson* v. *Moor*, 1 Lord Raym. 486; S. C. 12 Mod. 262; Willes, 74, n.

90. Or that the plaintiff was obliged to carry his goods by a circuitous and inconvenient way. *Ibid.*

Acc. *Paine* v. *Patrick*, Carth. 191, 4; *Rex* v. *Incledon*, 1 M. and S. 268; Sed vide *Hart* v. *Basset*, T. Jon. 157; *Chichester* v. *Lethbridge*, Willes, 71.

C. (b) *Obstruction of windows.*

91. An adverse enjoyment of windows for twenty years, *or perhaps less*, is a sufficient title in an action for an obstruction. *Cotterell* v. *Griffiths*, 4 Esp. 69. Kenyon, C. J. 1801.

And see *Darwin* v. *Upton*, 2 Saund. 175. a. n.; *Lewis* v. *Price*, *ib.* S. C. Esp. D. N. P. 636; *Daniel* v. *North*, 11 East, 372.

92. Where an ancient window has been shut up for above twenty years, it loses its privilege. *Lawrence, widow*, v. *Obee*, 3 Campb. 514. Ellenborough, C. J. 1814.

And see *Lord Guernsey* v. *Rodbridges*, Gilb. Eq. Rep. 3; Com. Dig. Temps. G.

93. Where an ancient window is enlarged and heightened, the owner of the adjoining premises is not at liberty to *cover* any part of the space occupied by the original window, though the unobstructed part of the new window be larger than the old window, and though the party have no other means of reducing the window to its former size. *Chandler* v. *Thompson*, 3 Campb. 80. Ellenborough, C. J. 1811.

And see *Cherrington* v. *Abney*, 2 Vern. 646. But see post C. (c) 1, 93.

94. But where the injury complained of is the erection of a wall, whereby the plaintiff's window is *generally* darkened, the action cannot be maintained, if it appear that the plaintiff can prescribe only for a window to a malthouse, and that the light now admitted is sufficient for the original purpose. *Martin and another* v. *Goble*, 1 Campb. 322. Macdonald, C. B. Horsham, 1808.

And see *East India Company* v. *Vincent*, 2 Atk. 83.

C. (c) *Nuisance to watercourses.*

95. An action for putting plaintiff's wheel in back water was held not to be maintainable, where it appeared that the wheel had been widened within twenty years, though it anciently stood deeper in the water, and would in that state have been still more affected by the obstruction. Burrough, J. Salisbury, 1817.

But the court of K. B. granted a rule for a new trial in Michaelmas term.

And see ante pl. 90; *Bealey* v. *Shaw*, 6 East, 208.

C. (d) *Negligence in enclosing buildings.*

96. The occupier of a house is bound to fence in a dangerous area, though it has immemorially remained open. *Coupland* v. *Hardingham*, 3 Campb. 396. Ellenborough, C. J. 1813.

97. And is answerable for the negligence of a person working for him under a sub-contract. *Matthews* v. *West London Water Works*, 3 Campb. 403. Ellenborough, C. J. 1813.

Acc. *Bush* v. *Steinman*, 1 Bos. and Pul. 404. And see *Flower* v. *Adam*, 2 Taunt. 314.

98. A corporate body, entrusted with a power from which mischief may result to the public, are bound to exercise it as innocently as possible in the day time, and with especial caution at night. *Weld* v. *Gas Light Company*, 1 Stark. 189. Ellenborough, C. J. 1816.

C (e). *Injury to reversionary interest.*

99. Landlord may bring either case or trespass for voluntary waste committed after the expiration of a notice to quit. *Burchell* v. *Hornsby*, 1 Campb. 360 Ellenborough, C. J. 1808.

AGENT.

A. RIGHTS OF PRINCIPAL AGAINST AGENT.

B. RIGHTS OF AGENT AGAINST PRINCIPAL.

C. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

(a) *On contract of agent.*

(b) *For tort of agent.*

D. RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.

E. LIABILITY OF AGENT TO THIRD PERSONS.

F. RIGHTS OF AGENT AGAINST THIRD PERSONS.

A. RIGHTS OF PRINCIPAL AGAINST AGENT.

(And see INSURANCE Q. (b).)

1. Where a person who is requested to collect debts, remits the amount by post, he is not answerable for the safe arrival of the remittance. *Warwicke* v. *Noakes*, Peake, 67. Kenyon, C. J. 1791. S. P. said to have been decided in chancery forty years before, *ibid.*

2. Agent consignee abroad on *del credere* commission being applied to by consignor to advance on proceeds, remits bills purchased by consignee, which turn out unproductive; Quære, upon whom shall the loss fall? And decided, by a jury of merchants, to whom it was left that it shall fall on the consignee. *Lucas and others, Assignees* v. *Groning and others*, 1 Stark. 391. Gibbs, C. J. 1816.

And see *Russel* v. *Hankey*, 6 T. R. 12; *Belchier* v. *Parsons*, Ambl. 218.

3. A party who *gratuitously* undertakes to procure a policy of insurance in a particular form, and effects the insurance in a different manner, is liable for a loss arising from his mismanagement. *Wilkinson* v. *Coverdale*, 1 Esp. 75. Kenyon, C. J. 1793.

4. S. P. said to have been ruled in *Wallace* v. *Tellfair*, 1 Esp. 76. Buller, J. 1786.

S. C. not S. P. 2 T. R. 188. n.; *S. P. Seller* v. *Work*, Eldon, C. J. Marshall, 299.

As to the extent of the agent's liability, see *Delaney* v. *Stodart*, 1 T. R. 202; *Harding* v. *Carter*, Park, 4; *Smith* v. *Cologan*, 2 T. R. 188. n. Mal. 86; Beawes, L. M. 50; 2 Ves. 239.

5. An army agent is responsible for the price of a commission sold by him for an officer on foreign service. *Sturdy* v. *Ross*, 1 Esp. 450. Kenyon, C. J. 1795.

6. An agent who pays the money of his principal into his banker's hands, generally, and uses it as his own, is liable for interest. *Rogers, assignee of Stokes*, v. *Edmund Boehm, Henry Nantes, and John Taylor*, 2 Esp. 702. Kenyon, C. J. 1798.

S. P. as to assignees, *Trevers* v. *Townsend*, 1 Bro. Cha. Ca. 384; and as to executors, *Franklin* v. *Frith*, 3 Bro. Cha. Ca. 433.

7. *Semble*, that where an agent is employed to sell goods on credit, and he receives part only of the price, the principal cannot sue the agent for such part, but must wait until the whole be received, unless the payment be delayed by the default of the agent. *Varden, executor of Johnson* v. *Parker*, 2 Esp. 710. Buller, J. 1798.

8. In an action for not accounting for goods delivered to the master of a ship, to be sold by him abroad, it is no defence that they were exported without paying duties, unless this evasion were part of the agreement. *Catlin, spinster* v. *Bell*, 4 Campb. 183. Ellenborough, C. J. 1815.

9. Goods are delivered to A. to be sold by him in a particular place, which he is unable to sell there; he has no right to send them elsewhere under the care of another person. *Ibid.*

10. A rider may solicit his employer's customers to give their orders to himself when he shall have set up business, provided the orders which he takes at the time are to be executed by his employer. *Nichol et alt.* v. *Martyn*, 2 Esp. 732. Kenyon, C. J. 1799.

11. A consignor is bound to advise the consignee of the shipment of the goods, except where in former transactions between the parties the consignee has acquiesced in the omission of advice. *Goom* v. *Jackson*, 5 Esp. 112. Lawrence, J. 1804.

12. A person who agrees generally to give up his time and attention to the

concerns of his employer, cannot hire out part of his services to a stranger. *Thompson* v. *Havelock*, 1 Campb. 527. Ellenborough, C. J. 1808.

13. And if such contract be in fact entered into, and the consideration stipulated to be paid for such service find its way into the hands of the employer, no action will lie at the suit of the servant to recover the amount. *Ibid.*

S. P. *Curtis* v. *Bridges*, Comb. 250; *Barber* v. *Dennis*, 1 Salk. 68; 6 Mod. 69; 12 Mod. 415. S. C. And see Co. Litt. 117. a. n. (1) *Truswell* v. *Middleton*, 2 Roll. Rep. 269; Cro. Jac. 658. S. C.

14. Plaintiff employed the defendant to receive money for him at Paris, and directed the amount to be remitted to him at Fredericksburgh. Defendant remitted the money to A. at Baltimore, in bills payable to plaintiff's order. Held, that the defendant could not be called upon to repay the amount in an action for money had and received. *Duncan* v. *Skipwith*, 2 Campb. 68. Ellenborough, C. J. 1809.

15. Merchants receive a bill of lading from a stranger, who requests them to effect insurance; declining the transaction, they indorse the bill of lading to a friend of the consignor, who fails—The merchants are liable for the value. *Corlett* v. *Gordon and another*, 3 Campb. 472. Ellenborough, C. J. 1813.

16. If a factor acting without a *del credere* commission, chooses to indorse a bill, which he is directed to procure for his principal, he is liable to the latter as an indorser. *Goupy and others* v. *Harding and others*, Holt. 342. Gibbs, C. J. 1816.

17. The plaintiff having drawn a cheque on the defendant, tore it in four pieces. The fragments being pasted together were presented by a stranger to the defendants, who paid the amount, though the paper was soiled and the rents were quite visible. Held, that the defendants could not take credit for the amount. *Scholey* v. *Ramsbottom and others*, 2 Campb. 485. Ellenborough, C. J. 1810.

Acc. *Pothier, Traité du Contrat de Change, partie* 1, chap. 4, sect. 99, *et seq.*

18. The master of a vessel draws a bill from the Cape of Good Hope on his owner in England, and obtains a premium on the exchange. Held, that he cannot retain such premium from his principal, notwithstanding an improper usage for the master under these circumstances to be allowed the advantage arising from the state of the exchange. *Diplock and others, executors, &c.* v. *Blackburn*, 3 Campb. 43. Ellenborough, C. J. 1811.

Acc. *Brown* v. *Litton*, 1 P. Wms. 141.

19. Where a servant has usually accounted with her master for monies received to his use, without any written vouchers, it is not sufficient to charge the servant, to shew that particular sums have come to her hands; it must be proved that she has *not* paid them over. *Evans* v. *Winifred Birch*, 3 Campb. 10. Ellenborough, C. J. 1811.

20. If factors remit to their principal a bill or note for the balance of the price of goods sold, without mentioning the terms of the sale, or the name of the vendee, they cannot, upon the insolvency of such vendee, throw the loss upon their employer. *Simpson and another* v. *Swan*, 3 Campb. 291. Ellenborough, C. J. 1812.

21. Money cannot be recovered from a party who would afterwards be entitled to claim the amount from the plaintiffs, for damages occasioned by their negligence as agents in the particular transaction. *Ibid.*

And see ASSUMPSIT, B.

22. A sworn broker, employed by a purchaser, may, for the purpose of making himself personally liable to the seller, become an intermediate purchaser; and his principal cannot repudiate a contract in this form, where he has previously acquiesced in a similar arrangement. *Kemble and others* v. *Atkins and another*, Holt. 427. Dallas, J. 1816.

And the court of C. P. refused a rule for a new trial. *Ibid.*

23. It is no breach of a London broker's bond that he refuses to allow his employer to inspect his contract book, if he add that it shall be produced at the proper time, and it is, in fact, produced the next day before an investigating court of aldermen. *Lord Mayor of London* v. *Brandon*, 1 Holt. 438. Ellenborough, C. J. 1816.

And the court of K. B. refused a rule to set aside the nonsuit. *Ibid.*

24. Or, if he employ a person, not being a sworn broker, to act with him, but not under him. *Ibid.*

25. Or if he grossly mistate the quantity of goods purchased by him for exportation, although such mistatement be productive of great loss to his employer, but is unconnected with any pecuniary benefit to himself. *Ibid.*

26. An agent who, on remitting bills drawn by his employer in payment, writes, "I promise to see the bills honored," is bound by such promise; the accepting of the bills in payment by the promisee being a sufficient consideration. *Morris* v. *Stacey*, Holt. 153. Gibbs, C. J. 1816.

B. Rights of Agent against Principal.

And see Insurance 2 (a).

27. A deputy, who, on his principal's appointment to an additional office, performs the duties of the new office, is not entitled to an increase of salary without an express contract. *Bell* v. *Drummond, executor, &c.* Peake, 45. Kenyon, C. J. 1791.

28. A. employs B. a salesman, to sell his cattle. C. a book-keeper and subagent employed by B. enters the cattle *in the name of A.* and receives the price; C. cannot set off the amount against a debt owing to him from B, notwithstanding an usage for such book-keeper to credit the salesman for the price of cattle sold. *Good* v. *Jones*, Peake, 176. Kenyon, C. J. 1793.

29. A London broker chartering a ship to the Baltic, is entitled to 5l. per cent. on the freight, *Cohen* v. *Pages*, 4 Campb. 96, 1814.

30. Assumpsit by a broker on contract to receive brokerage on signing an agreement, and held that a written and signed agreement alone will enable plaintiff to recover. *Edjar* v. *Blick*, 1 Stark. 464, Ellenborough, C. J. 1806.

31. A surveyor declaring against his employer on a *quantum meruit*, is to be compensated for his labour; but cannot recover a per centage on the money paid to the tradesman whose bills he looks over, and whose work he measures, notwithstanding an usage amongst surveyors to that effect. *Upsdell* v. *Stewart*, Peake, 193. Kenyon, C. J. 1793.

32. But in a subsequent case, commission of five per cent. on the sum laid out allowed to a surveyor on a *quantum meruit*. *Chapman and others* v. *De Tastet*, 2 Stark. 291. Ellenborough, C. J. 1817.

33. Ship-broker held entitled to five per cent. on the gross freight on a voyage to Rio Janeiro, though part of the freight depended on the contingency of the arrival. *Roberts and others* v. *Jackson and others*, 2 Stark. 225. Ellenborough, C. J. 1817.

And see Auction, post.

34. On a sale of colonial produce in London, the broker is entitled to one-half per cent. from the buyer, though originally employed by the seller. *Eicke* v. *Meyer*, 3 Campb. 412. Ellenborough, C. J. 1813.

35. Where B. by the direction of his employer A. ships the property with which he was entrusted to the address of C.; after which B. pays a sum of money to redeem the property from seizure, B.'s agency being expired, this is a voluntary payment for which A. is not liable. *Edmiston* v. *Wright, bart.* 1 Campb. 88. Ellenborough, C. J. 1807.

And see *Child* v. *Morley*, 8 T. R. 610.

36. A factor grossly misconducting himself is not entitled to commission. *White* v. *Chapman*, 1 Stark. 113. Ellenborough, C. J. 1815.

C. Liability of Principal to Third Persons.

C. (a) *On contract of agent.*

37. A memorandum, made by the vendor's broker, with the bought and sold notes copied therefrom and delivered to and accepted by each party, will bind both. *Rucker* v. *Cammeyer*, 1 Esp. 105. Kenyon, C. J. 1794.

38. And *semble*, that the bought and sold notes without an original entry are sufficient. *Dickenson* v. *Lilwal*, 1 Stark. 128. Ellenborough, C. J. 1815.

S. P. *Hinde* v. *Whitehouse*, 7 East, 559, 69. S. C. 3 Smith 528, 36.

And see *Simon* v. *Metivier*, 1 Bla. 599. S. C. 3 Burr, 1921. *Cooper* v. *Smith*, 15 East, 105, 8; *Blagden* v. *Bradbear*, 12 Ves. 466, 72; *Buckmaster* v. *Harrop*, 13 Ves. 456, 72, 3.

39. Qu. whether assignee of a bankrupt factor, taking *del credere* commis-

sion, may sue a purchaser where the factor has not paid his principal; point reserved. *Hudson* v. *Grainger*. Ellenborough, C. J. Sittings after Michas. Term, 1817. P.

40. Order to one firm to effect insurance, held well executed by another firm, if the firms have one or more members in common. *Dickson* v. *Lodge*, 1 Stark. 226. Ellenborough, C. J. 1816.

41. A transfer made by a factor who sells under a letter of advice from the consignor without the bill of lading, is valid against an indorsee of the bill of lading who has notice of the factor's authority to dispose of the property. *Dick* v. *Lumsden*, Peake, 189. Kenyon, C. J. 1794.

And see *Wright* v. *Campbell*, 4 Burr, 2046, 51. S. C. 1 Bla. 658; *Newson* v. *Thornton*, 6 East, 17, 39, 42; S. C. 2 Smith, 207; *Cuming* v. *Brown*, 9 East, 516; *Pickering* v. *Busk*, 15 East, 38, 42; *Martini* v. *Coles*, 1 M and S. 140.

42. Where a *special* agent employed to purchase an article of a particular quality, buys it of a different quality, the principal is not bound. *East India Company* v. *Hensley*, 1 Esp. 112. Kenyon, C. J. 1794.

And see *Fenn* v. *Harrison*, 3 T. R. 757, 61, and 4 T. R. 177. *Beawes Lex Merc.* 50.

N. For the distinction between a special and general agent, see *Whitehead* v. *Tuckett*, 15 East, 400, 8.

43. Where A. has usually subscribed policies for B., the latter is bound by a policy signed by A. in his name, without direct proof of the authority. *Neal* v. *Erving*, 1 Esp. 61. Kenyon, C. J. 1793.

And see *Rex* v. *Bigg*, 3 P. Wms. 419, 427.

44. An agent who underwrites and settles losses, has an implied authority to refer a dispute about a loss to arbitration. *Goodson and another* v. *Brooke*, 4 Campb. 163. Gibbs, C. J. 1815.

45. If after acts of supercargo contended to have been illegal, and consequent seizure of the vessel, the owners proceed in the admiralty court to recover possession, they adopt his acts, and are responsible for stores supplied up to the seizure. *Mitchell* v. *Glunie*, 1 Stark. 230. Ellenborough, C. J. 1816.

46. An agent who executes a deed under a power of attorney, cannot be examined with respect to the contents of such deed, unless the power of attorney be produced. *Johnson* v. *Mason*, 1 Esp. 89. Kenyon, C. J. 1794.

47. In an action against the master for the price of goods which have come to his use, it is no defence, that by a private agreement between the master and the servant to whom the articles were delivered, such articles were to be provided by the servant. *Precious* v. *Abel*, 1 Esp. 351. Kenyon, C. J. 1795.

Acc. *Rich* v. *Coe*, Cowper, 636.

48. A. directs B. to receive money for him, and B. employs C., who sends his clerk for it. Payment to the clerk is sufficient to charge B. in an action for money had and received to A.'s use. *Matthews* v. *Haydon, one, &c.*, 2 Esp. 509. Kenyon, C. J. 1796.

And see *Cary* v. *Webster*, 1 Stra. 408.

49. Where a factor sells goods in his own name, the vendee has a right to consider him as principal; and in an action brought by the real vendor, the vendee may set off a debt owing to him from the factor. *George* v. *Claggett and Pratt*, 2 Esp. 557.

And the court of K. B. discharged a rule for a new trial. *Ibid*, and 7 T. R. 359.

S. P. *Rabone* v. *Williams*, 7 T. R. 360, n.

And see *Scott* v. *Surman*, Willes, 400.

50. A power of attorney to call in debts, when given as part of a security for money, is not revocable. *Walsh* v. *Whitcomb*, 2 Esp. 565. Kenyon, C. J. 1797.

Acc. *Bromley* v. *Holland*, 7 Ves. 28.

But see *Lepard* v. *Vernon*, 2 Ver. B. 51. And see *Odes* v. *Woodward*, 2 Lord Raym. 849, 50. post, § 66, &c.

51. Where a ship is put up at the Royal Exchange by the broker, as a general ship *warranted to sail with convoy*, and hand-bills are distributed to the same effect, the owner is bound by such representation, though made without his authority. *Runquist* v. *Ditchell*, 3 Esp. 64. Kenyon, C. J. 1799.

S. C. *Abbott on Shipping*, part 2, cap. 2. s. 8, 2 Campb. 556. n.

52. And he is liable to an action on the case at the suit of shippers, who, in

consequence of the sailing without convoy, are prevented from recovering upon a policy of insurance containing a warranty. *Ibid.*

N. It was said by Gibbs, C. J., that there was not in this case, as had been supposed, an express warranty, the broker having merely inserted in the advertisement a clause purporting that the ship *would* sail with convoy, 4 Campb. 55 n. And see *Snell* v. *Marryatt.* Abbott's Law of Shipping.

53. So a servant employed to sell a horse, has an implied incidental authority to give a warranty of soundness; such a warranty being now usual. *Alexander* v. *Gibson*, 2 Campb. 555. Ellenborough, C. J. 1811.

S. P. *Pickering* v. *Busk*, 15 East, 38, 45.

Sed vide *Truswell* v. *Middleton*, 2 Roll. Rep. 269, 70, cont.

And see *Sohde* v. *Dyson*, 1 Smith, 400.

54. And therefore in an action on the warranty it is sufficient to prove that the horse was sold, and warranted by the defendant s servant, without calling the servant or shewing that he had a special authority for giving the warranty. *Ibid.*

55. A., to whom sugars are consigned for sale, deposits them with B. a broker, who advances money and accepts bills for A. B. may retain the sugar against C., the owner, unless the latter will repay the advances, and give a full indemnity against the acceptances. *Pulteney, bart.* v. *Keymer, et alt.* 3 Esp. 182. Kenyon, C. J. 1800.

56. And B. is not bound to take the counter acceptances of C. as an indemnity. *Ibid.*

57. If a tradesman trust a servant without any previous dealing upon credit, sanctioned by the master, the mastce is only liable for so much as comes to his use. *Pearce* v. *Rogers*, 3 Esp. 14. Eldon, C. J. 1800.

And see 27 lib. Ass. Fitz. Abr. Trespass, 230 F. N. B. 120 G. *Holden* v. *Newman*, 13 East, 161; *Stephens* v. *Derry*, 16 East, 147.

58. Defendants were in the habit of sending their porter to the plaintiff for goods with written orders, in the handwriting of one of their four clerks—The porter is discharged, and afterwards obtains goods on an order in the same form—The hand-writing must be identified, though no notice has been given to discredit the porter. *Pocock* v. *Sparrow*. Ellenborough, C. J., Guildhall, December, 1810, MSS.

59. An attorney who is retained to do a particular act, but who is also directed *to do the needful*, has authority to take such steps as have immediate relation to the act. *Dawson* v. *Sir Robert Lawley, bart.*, 4 Esp. 65. Kenyon, C. J. 1801.

60. If an agent directed to buy at a certain price, consider himself not to be absolutely limited to that price, his engagement, though exceeding the direction, will bind the principal. *Hicks* v. *Hankin*, 4 Esp. 114. Heath, J. Hertford, 1802.

61. Where a servant, without the privity of his master, employs a tradesman to repair his master's carriage, the master is not liable. *Hiscox* v. *Greenwood*, 4 Esp. 174. Ellenborough, C. J. 1802.

62. A master who furnishes his servant with money *before hand* for the purchase of goods is not liable for goods taken up on credit. *Rusby* v. *Scarlett*, 5 Esp. 76. Ellenborough, C. J. 1803.

Acc. *Boulton* v. *Arlsden*, 3 Salk. 234.

63. But where the master advances money on account generally, and does not always keep the servant in cash, he gives the servant a right to pledge his credit. *Ibid.*

Acc. *Sir Robert Wayland's case*, 3 Salk. 234; *Boulton* v. *Arlsden*, *ibid*; *Hazard* v. *Treadwell*, 1 Stra. 506.

64. The declaration of a servant employed to sell a horse, is evidence to charge the master with a warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. *Helyear* v. *Hawke*, 5 Esp. 72. Ellenborough, C. J. 1803.

And see *Biggs* v. *Lawrence*, 3 T. R. 454.

65. A servant authorized to warrant a horse *sound*, may warrant him *young*, unless expressly restricted from so doing. *Ibid.*

And see *Fenn* v. *Harrison*, 3 T. R. 757; 4 T. R. 177. *Strode* v. *Dyson*, 1 Smith, 401; *Grammar* v. *Nixon*, 1 Stra. 657.

66. Death is a revocation of a power of attorney; though coupled with an interest. *Watson and wife, administratrix of Maxwell* v. *King*, 4 Campb. 272,

1 Stark. 121. Ellenborough, C. J. 1818.

And see Co. Litt. 52, b; *Roby* v. *Twelves*, Styles, 424.

S. P. *Shipman* v. *Thompson*, Willes, 105.

N. Although the act were appointed to be done after the death of the principal; Roll. Abr. Feoffments, S. 1. And see *Tatt* v. *Hilbert*, 2 Ves. 118; *Wynne* v. *Thomas*, Willes, 565; 1 Bac. Abr. Authority, E.

67. And a payment to the attorney, made after the death of the principal, is bad. *Wallace, administrator*, v. *Cook*, 5 Esp. 117. Ellenborough, C. J. 1804.

N. By the *civil law*, payment before the death of principal can be known. is valid. Dig. 17, 1, 26, 1. And see Dig. 17, 1, 58. *Pothier Traite du Contrat de Change*, part 1. chap. 6. art. 1. § 168.

And see dict. per Bayley J. in *Snaith* v. *Mingay*, 1 M. and S. 95; LIEN, A. 9; 2 Ves. 118; 5 T. R. 215; 18 Ves. 142, 146.

68. A. being indebted to B. on going abroad, leaves a general power of attorney with him, and sends an order to C., to whom he had consigned goods, to remit the proceeds on his account to B.; C. sells the goods, and remits the proceeds to B. Afterwards, and before B. receives the money, A. becomes bankrupt; B. may apply the proceeds in satisfaction of the debt due to him from A. *Alley and others, assignees of Jameson, a bankrupt*, v. *Hotson*, 4 Campb. 325. Ellenborough, C. J. 1815.

69. In an action on a policy subscribed by an agent under a power of attorney, it is sufficient proof of the agency, that the defendant is in the habit of paying losses upon policies so subscribed, without producing the power. *Haughton* v. *Ewbank*, 4 Campb. 88. Ellenborough, C. J. 1814.

70. An agent authorized to underwrite a policy, may adjust the loss. *Richardson* v. *Anderson*, 1 Campb. 43. n. Ellenborough, C. J. 1805.

71. One partner possesses no *general* authority under a power of attorney granted to his co-partner. *Edmiston* v. *Wright, bart.*, 1 Campb. 88. Ellenborough, C. J. 1807.

And see *Parker* v. *Kett*, 1 Salk. 96; S. C. 1 Lord Raymond, 658; *Comber's case*, 9 Rep. 76. a; *Warner* v. *Hargrave*, 2 Roll. Rep. 393; 2 Ch. Cases, 202.

72. Goods are bought by a broker in his own name. Before the time of payment he becomes insolvent, and discloses his principal. The latter cannot set off any demand upon his broker against the price of the goods. *Waring and others* v. *Favenck and others*, 1 Campb. 85. Ellenborough, C. J. 1807.

And see *Paterson* v. *Gandasequi*, 15 East, 62.

73. And *semble*, that the principal would not be discharged by a payment to his own broker, if made before the stipulated day. *Kymer and others* v. *Suwercropp*, 1 Campb. 109, 180. Ellenborough, C. J. 1807, and K. B. 1808.

S. P. *Speering* v. *Degraves*, 2 Vern. 643.

74. *Secus*, if the vendor suffer the day of payment to pass without a demand: in which case the principal would be justified in supposing that the vendor meant to rely on the credit of the broker. *Ibid.*

75. And where the vendor permits *his* broker to deal with goods as if he were the owner, payment to him, though before the stipulated time, will discharge the vendee. *Coates and another* v. *Lewes and another*, 1 Campb. 444. Ellenborough, C. J. 1808.

Acc. *De Leira* v. *Edwards*, 1 M. and S. 147.

And see *Favenc* v. *Bennett*, 11 East, 36.

76. After a sale through brokers, without disclosing the principal upon a certain credit, payment to the brokers upon other terms of credit, although equivalent in the usage of trade, is not available against assignees of the principal. *Campbell and another assignee* v. *Hassell*, 1 Stark. 233. Ellenborough, C. J. 1816.

77. But if a broker deliver a bought note and a sold note which *materially* differ, the contract cannot be enforced. *Cumming* v. *Roebuck*, Holt. 172. Gibbs, C. J. 1806.

78. Where it appears that an agent is directed generally to sell, it will be presumed that he is authorized to sell only in the usual way of business. If, therefore, he agree to give credit upon a sale of stock, which is constantly sold for ready money, the principal is not bound. *Wiltshire* v. *Sims*, 1 Campb. 258. Ellenborough, C. J. 1808.

Acc. Anon. 12 Mod. 514. per Holt, C. J. Semb. cont. Anon. Dyer, 39, a.

79. A. is employed by B. to sell his horse; A. sells B.'s horse, and another belonging to C. at an entire price to D., and warrants both horses sound; D. cannot sever the contract and bring his action upon the warranty against A. in respect of the unsoundness of his horse. *Symonds* v. *Carr*, 1 Campb. 361. Ellenborough, C. J. 1808.

S. P. *Hort* v. *Dixon*, Selw. 98.

80. Where a candidate has generally recognized the acts of his committee, the chairman possesses an implied authority to make any contract for the candidate connected with the election. *Honeywood* v. *Sir William Geary*, 6 Esp. 119. Mansfield, C. J. 1808.

81. And *semble*, that the authority extends to each member of the committee individually. *Ibid.*

82. Where a factor sells goods without mentioning the name of any principal, but before the whole quantity is delivered, the vendee is informed who is the real vendor by the factor's clerk, the vendee cannot set off any demand which he may have upon the factor against the price of the goods. *Moore* v. *Clementson and others*, 2 Campb. 22. Ellenborough, C. J. 1809.

And see *Drinkwater* v. *Goodwin*, Cowp. 251, 5, 6.

83. Where a broker sells goods as his own, the vendee is justified in paying him in a different manner from that prescribed by the original terms of the purchase. *Blackburn* v. *Scholes and another*, 2 Campb. 343. Ellenborough, C. J. 1810.

And see *Favenc* v. *Bennett*, 11 East, 36.

84. And the circumstance of the vendor's being described in the sale catalogue as a *sworn broker*, is not sufficient to charge the vendee with notice that the former effected the sale as agent of an undisclosed principal. *Ibid.*

85. But if a man sell goods expressly in the character of a broker, the terms of the contract cannot be afterwards varied without the authority of the principal. *Ibid.*

86. Where, however, the principal has on some occasions authorised his broker to draw bills in his own name, he cannot, after the insolvency of the broker, object to such a mode of payment. *Townsend and others* v. *Inglis, Reid, Irving and Co.* Holt. 278. Gibbs, C. J. 1816.

87. A factor has no power to pledge, even where he accepts bills on account of the consignors, and is directed by them to deal with the goods according to his discretion. *Graham and others* v. *Dyster*, 2 Stark. 21. Ellenborough, C. J. 1816.

And the court of K. B. granted a new trial after a nominal verdict for the defendant. *Ibid.*

88. An insurance broker has no general lien upon a policy effected for a balance due to him from the agent who orders the insurance, though such agent represent that he has authority to indorse the bill of lading. *Lanyon* v. *Blanchard*, 2 Campb. 597. Ellenborough, C. J. 1811.

89. Debtor's agent offers to pay the creditor's agent in bank notes, and the latter requests to have a cheque as more convenient to himself. If the cheque be dishonoured the debtor is not discharged, as the cheque of the agent must be considered as his own. *Everett* v. *Collins*, 2 Camp. 515. Ellenborough, C. J.

Sed vide dict. per Lord Kenyon in *Tapley* v. *Martens*, 8 T. R. 453.

And see post, Ship, D.

90. So in covenant on a charter party, it is no defence that the plaintiff received the freight in a bill drawn by the defendant's agent, although the defendant was not informed of the transaction until after the failure of the drawer and acceptor. *Marsh* v. *Pedder*, Holt. 72. Gibbs, C. J. 1815.

91. An usage that where goods are sold by a broker, by bill, the seller retains the power of annulling the contract, if he doubt the credit of the purchaser, is reasonable and valid. But the rejection must be intimated as soon as the seller has had time to inquire into the solvency of the purchaser; and five days appeared to the court and jury to be too long a period. *Hodgson* v. *Davies*, 2 Campb. 530. Ellenborough, C. J. 1810.

92. In avoidance of a sale made by a broker, it may be shewn, that by the custom of the trade the authority to sell expires with the day on which it is given. *Dickenson* v. *Lilwall and others*, 4 Campb. 279; 1 Stark. 128. Ellenborough, C. J. 1815.

93. A broker empowered to dispose

of goods *at his discretion*, cannot pledge them without an express authority to that effect to meet bills accepted by him to the amount of the consignment. *Graham and others* v. *Dyster*, 2 Stark. 24. Ellenborough, C. J. 1816.

And the court set aside a nominal verdict for the pawnee. *Ibid.*

C. (b) *Liability of principal for tort of agent.*

(And see post D, 106.)

94. A person who contracts with a tradesman to pay him ready money, and gives his servant the amount weekly, which is at first regularly paid over, is not liable if the servant afterwards embezzle the money. *Stubbing* v. *Heintz*, Peake, 47. Kenyon, C. J. 1791.

Contra. *Boulton* v. *Arlsden*, 3 Salk, 234.

Sed vide S. C. 1 Lord Raym. 225.

95. But where the master employs a servant to buy on credit, he is liable to whatever extent the servant may pledge his credit. *Ibid.*

96. A. having purchased goods of B. on credit, gives notice to B.'s servant that in future he shall always pay for the goods as he receives them. A. accordingly pays the servant who embezzles the money. A. is not discharged, unless he shew that the notice reached B. *Gratland* v. *Freeman*, 3 Esp. 85. Eldon, C. J. 1800.

97. The proprietor of a newspaper is answerable criminally as well as civilly for the misconduct of the editor. *Rex* v. *Walter*, 3 Esp. 21. Kenyon, C. J. 1799.

98. A. draws a bill on B. and forges B.'s acceptance; B. pays the bill when due. A. draws a similar bill and again forges B.'s acceptance; B. is liable as acceptor. *Barber* v. *Gingell*, 3 Esp. 60. Kenyon, C. J. 1799.

99. A. contracts for the laying of pipes in a highway with B., who contracts with C. A. is liable for an injury occasioned by the negligence of C. *Mathews* v. *West London Water Works*, 3 Campb. 403. Ellenborough, C. J. 1813.

S. P. *Bush* v. *Steinman*, 1 Bos. and Pul. 405.

And see *Flower* v. *Adam*, 2 Taunt. 314; *Nicholson* v. *Mounsey*, 15 East, 384; post, PENAL ACTION, A. (g).

D. RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.

100. A. employs B. to effect an insurance; B. employs C., without notice, that he is acting for A. C. may hold the policy against A. for a general balance due to him from B. *Westwood* v. *Bell and another*, 4 Campb. 349; and Holt. 122. Gibbs, C. J. 1815.

101. A., as factor for B., residing in Holland, procures a bill of exchange from C., in favour of B. Before the *customary days* for giving value for the bill are elapsed, A. becomes bankrupt; B. cannot sue C. *Puget de Bras* v. *Forbes and Gregory*, 1 Esp. 117. Loughborough, C. J. 1792.

102. If A. employ B., supposing him to be a proctor, though in fact he is merely a clerk to C., A. is liable to C. for the work done, unless the amount have been actually paid to B. *Brown* v. *Brooks, widow*, 1 Esp. 388. Kenyon, C. J. 1795.

N. So if B. were apprentice to C; *Barber* v. *Dennis*, 1 Salk. 68; S. C. 6 Mod. 69.

And see Co. Litt. 117 a, n. (161); 2 Saund. 479.

103. A servant employed to deliver goods is a competent witness to prove the delivery. *Adams* v. *Davies*, 3 Esp. 48. Eldon, C. J. 1799.

104. It might perhaps be otherwise, if it could be shewn that it was usual for the servant to receive payment from the customer. *Ibid.*

And see EVIDENCE, K. 2.

105. Where an agent makes a deposit on a treaty for a purchase as for himself, the principal may, upon the default of the vendor, sue for the amount in his own name. *Duke of Norfolk* v. *Worthy*, 1 Camp. 337. Ellenborough, C. J. and K. B. E. 1808.

And see post, E, 110.

106. The master of a vessel freighted to A. delivers the cargo at B., at which place the cargo is accepted by the freighter. This is not such a substitution of B. for A. as will entitle the owner to sue for the freight stipulated by the charter-party, unless the master had *express* authority to alter the voyage. *Burgon* v. *Sharpe and others*, 2 Campb. 529. Ellenborough, C. J. 1810.

107. If, after tender and refusal of the amount of a debt, the money is lost through the insolvency of the agent employed to make the tender, the creditor is not chargeable with the loss. *Dent* v. *Dunn, executrix, &c.* 3 Campb. 296. Ellenborough, C. J. 1812.

E. LIABILITY OF AGENT TO THIRD PERSONS.

108. A son who conducts the business of a superannuated father, and appears to be the proprietor, is personally liable for goods bought by him. *Turrel* v. *Collet*, 1 Esp. 320. Kenyon, C. J. 1795.

And see *Saunders* v. *Vincent*, 6 Bac. Ab. 688.

109. An agent who orders goods from a tradesman without stating at the time that they are for his principal, is liable for the amount. *Owen* v. *Gooch*, 2 Esp. 568. Kenyon, C. J. 1797.

110. If the tradesman refuse to deliver the goods on the credit of the principal and require the credit of the agent, the latter is alone liable. *Ibid.*

111. Where the goods are ordered expressly on the account of an unnamed principal, and after delivery the agent refuses to give up his principal, the agent is liable. *Ibid.*

112. But if the order be given *in the name of a third person*, and the goods be delivered accordingly, the agent cannot be charged. *Ibid.*

And see *Graham* v. *Stamper*, 2 Vern. 146.

113. Where money has been received by an agent upon a contract founded in corruption, oppression, or immorality, he is not discharged by paying it over to his principal. *Miller* v. *Aris*, 3 Esp. 233. Kenyon, C. J. 1800.

S. C. Selw. 88 n.

And see *Sadler* v. *Evans*, 4 Burr. 1985; *Buller* v. *Harrison*, Cowp. 565; *Snowdon* v. *Davies*, 1 Taunt. 359; ASSUMPSIT E. (f); BASTARDS A. (b).

114. A. and B. severally employ a person to sell their horses. The agent sells them at an entire price to C. and warrants both horses sound; C. cannot sever the contract, and sue A. in respect of the unsoundness of A.'s horse, but is confined to his action against the agent. *Symonds* v. *Carr*, 1 Campb. 361. Ellenborough, C. J. 1808.

Acc. Selw. 98.

115. An agent selling goods after notice that they are not the property of his employer, is personally liable to the vendee for the purchase money. *Hardacre* v. *Stewart*, 5 Esp. 103. Ellenborough, C. J. 1804.

And see 5 Burr. 2639.

116. An attorney who signs a conditional undertaking to give up bills which he holds on account of his client, is personally liable, unless it appear *upon the instrument* that he entered into the engagement merely as agent. *Kendray* v. *Hodgson, gent. one, &c.* 5 Esp. 229. Ellenborough, C. J. 1805.

S. P. Per Ashhurst, J. in *Macbeath* v. *Haldimand*, 1 T. R. 181; *Woodhouse* v. *Bradford*, 1 Roll. Abr. 593, 4 acc.

117. A receipt signed "A. for B.," A. being in fact only clerk to B., is not sufficient to charge A. in an action for money had and received. *Edden* v. *Read*, 3 Campb. 339. Ellenborough, C. J. 1813.

And see ante D. 104; *Coles* v. *Wright*, 4 Taunt. 198.

118. An agent who guarantees that the shipment will be found to be in conformity with the *revenue* laws of Great Britain, so that no impediment shall arise from the importation thereof, or that in default, the consequences shall rest with his employers, renders himself personally liable for an impediment, arising from a non-compliance with the *navigation* act. *Redhead and another* v. *Cator*, 1 Stark. 14. Ellenborough, C. J. 1815.

119. In a declaration upon such a guarantee it is unnecessary to state an application for an indemnity to the principal. *Ibid.*

120. An agent, at the request of his principal, promises to pay a sum of money to a third person at a future day, *provided he receives money on account of his principal.* This is a contingent appropriation of such sum; to meet which, the agent is bound to retain any money he may afterwards receive. *Stevens* v. *Hill*, 5 Esp. 247. Ellenborough, C. J. 1805.

Acc. F. N. B. 121 F.

121. And he cannot discharge himself by shewing that, subsequently to the promise, he has made other payments on account of his principal. *Ibid.*

S. P. *Maber* v. *Massias*, 2 Bla. 1072.

And see *Clark* v. *Adair*, cited 4. T. R. 343.

F. RIGHTS OF AGENT AGAINST THIRD PERSONS.

122. A factor may sue in his own name for goods sold, though the name of the owner be declared at the time of sale. *Atkyns and Batten* v. *Amber*, 2 Esp. 493. Eyre, C. J. 1796.

Sed vide Pothier, Traité de l'action *condictio indebiti*, part 3, sect. 2, art. 4, num. 163; Dig. 12, 6, 6; *ibid*, 12, 6, 53; *ibid*, 12, 6, 57; post, BANKRUPT, C; *Moore* v. *Hopper*, 2 N. R. 411.

123. An executor employs A. to continue the testator's trade for the benefit of the estate in A.'s own name; A. may sue upon a contract made by him in respect of such trade. *Wilkes* v. *Lister*, 6 Esp. 78. Ellenborough, C. J. 1806.

124. In assumpsit against consignee for not accounting, also for goods sold and money had, the sale by defendant need not be proved; after a reasonable time it will be presumed, or plaintiff may proceed for not accounting. *Hunter* v. *Welsh*, 1 Stark. 224. Ellenborough, C. J. 1816.

AGREEMENT.

(And see STAMPS, B.)

A. HOW CONSTRUED.

(a) *Where agreement affects the contracting parties only.*

(b) *Agreement in respect of third persons.*

B. VALID OR ILLEGAL.

C. BREACH OF AGREEMENT.

(a) *What shall be.*

(b) *How waved.*

A. HOW CONSTRUED.

A. (a) *Where agreement affects the contracting parties only.*

1. Upon the settlement of accounts between A. and B. the balance is 8*l.* in favour of A. who agrees to take 4*l.* down, and to receive the remainder at the end of a month. B. gives A. a draft upon an improper stamp for the last 4*l.* A. cannot sue until the month is expired. *Swears v. Wells*, 1 Esp. 317. Kenyon, C. J. 1795.

Sed vide post ASSUMPSIT A. (a) 1. PLEADING H. (b) 23.

2. An indemnity against debts specified in a schedule, though one of the debts be underrated is available *pro tanto. Hancock v. Clay*, 2 Stark. 100. Ellenborough, C. J. 1817.

3. A. engages not to open a shop within one mile of B's. shop; the shortest access by the foot-path is to be taken. *Woods v. Dennett*, 2 Stark. 89. Ellenborough, C. J. 1817.

4. Where a builder contracts for a particular sum, and additions are made to the original plan, the contract remains binding as far as it can be traced, and the excess only is recoverable on a *quantum meruit. Pepper* v. *Burland*, Peake, 103. Kenyon, C. J. 1791.

5. S. P. *Robson v. Godfrey and Thomas*, Holt. 236. Gibbs, C. J. 1816.

6. Where, in answer to an attorney's bill, the defendant sets up an agreement by which the plaintiff undertook to conduct his suits without charge, in consideration of having his conveyancing business, the defence is not met by proving that the defendant has employed other persons to draw his leases. The plaintiff should either have given notice to the defendant to discontinue the agreement, or have resorted to a special action. *Parker and Rich v. Harcourt*, 5 Esp. 249. Ellenborough, C. J. 1805.

7. Where an agreement for the sale of leasehold lands, contained a stipulation that the purchaser should take the crops at a valuation, which valuation being made, the purchaser entered and took the crops, but the vendor did not make a good title to the lands, it was held, that the vendor could not sever the contract and recover in *indebitatus assumpsit*

for the crops. *Neale and others v. Viney*, 1 Campb. 471. Ellenborough, C. J. Guildford, 1808.

And see *Kirtland v. Pounsett*, 2 Taunt. 145; *Corder v. Drakeford*, 3 Taunt. 382.

8. Contract for goods "free on board a foreign ship." The seller cannot be required to give an order for transferring them into the purchaser's name in the warehouse. *Wackerbarth v. Masson*, 3 Campb. 270. Ellenborough, C. J. 1812.

9. S. P. Ruled in *Wetherell v. Coape*, Campb. 272 n. Mansfield, C. J. 1812.

10. On a sale in London of goods at sea, it is agreed that if they shall not arrive on or before 31st December, the bargain shall be void. The parties must be understood to have had in contemplation an arrival at London only. *Idle and others v. Thornton and others*, 3 Campb. 274. Ellenborough, C. J. 1812.

11. The assured agrees to repay the loss to the underwriter in case the property detained by the Russian government shall be restored: it is sufficient to shew a yielding up of the goods *quasi in integro*, notwithstanding some spoliation during the detention. *Jordaine v. Cornwall and others*, 1 Stark. 6. Ellenborough, C. J. 1814.

12. An agreement that the tenant shall be at liberty to quit at L. D. 1814, in which case the landlord engages to take the fixtures at a valuation, or permit the tenant to let the house, vests an option in the latter in the event of his so quitting. *Cotton v. Lingham*, 1 Stark. 39. Le Blanc, J. 1815.

13. A letting to an under tenant till L. D. 1814, is not an exercise of this option. *Ibid.*

14. An unstamped agreement by way of defeasance indorsed upon a note by the payee, does not affect his right of action. *Stone v. Metcalf*, 4 Campb. 217. 1 Stark. 53. Ellenborough, C. J. 1815.

15. The payee of a note indorses upon "it my will and desire is, that the money "shall not be called in for two years, "&c. and that if the said C. S. shall "wish for further time, he shall have it "without suit at law until three years "next after my decease." Semble, these are words of mere indulgence and favour, and do not operate as a defeasance. *Ibid.*

16. A. contracts to deliver to B. 50 tons of hemp, the ship's name to be declared as soon as known, and to arrive before the 31st December. A. is not bound to deliver the whole quantity from one ship, although he had first given notice to that effect, and although the vessel contained a larger quantity, which was delivered to previous purchasers. *Thornton and others* v. *Simpson and others*, Holt. 163. Gibbs, C. J. 1816.

A. (b) *Agreements in respect of third persons.*

And see post 1, Frauds, Statute of D. Merger.

17. Where A. undertakes to pay for goods to be shipped on account of B. at nine months from the date of the shipment of the goods, no notice need be given to A. of the shipment. *Oxley v. Young, et alt.* 1 Esp. 424. Eyre, C. J. 1795.

18. A specific contract for the purchase of a ship and goods cannot be controlled by a prior contract for the latter only. *Lano* v. *Reale*, 2 Stark. 105. Ellenborough, C. J. 1817.

19. If an heir, without consideration, bind himself to execute a voluntary conveyance of lands descended, he cannot be required to covenant for the acts of his ancestor. *Chapman* v. *Ladbroke*, 4 Esp. 149. Lawrence, J. 1802.

20. Drawee of a void check, tells the payee that he will pay it, as he is indebted to the drawer in a larger sum. This is not a promise to pay the debt of another, but an appropriation of part of the sum due from the drawee to the drawer, to the discharge of the debt owing from the latter to the payee. *Ardern v. Rowney*, 5 Esp. 254. Ellenborough, C. J. 1805.

And see *Yeates* v. *Groves*, 1 Ver. 280.

21. But if the drawee can shew that he was mistaken in supposing that he was indebted to the amount of the check, the payee can only recover the balance due to the drawer. *Ibid.*

22. A. being indebted to B. *assents* to the assignment of the debt to C.; C. may sue A. in his own name. *Surtees et alt.* v. *Hubbard*, 4 Esp. 204. Ellenborough, C. J. 1802.

And see post Baron and Feme, B. (b) F. N. B. 122, K. Y. B. P. 44, E. 3,

fo. 21, pl. 28. M. 9, H. 5, fo. 14, pl. 23. *Forth* v. *Stanton*, 1 Saund. 210, 211, n. 2. *Fenner* v. *Mears*, 2. Bla. 1269. *Master* v. *Miller*, 4. T. R. 340. *Innes* v. *Dunlop*, 8 T. R. 595. *Israel* v. *Douglas*, 1 H. Bla. 239. *Johnson* v. *Collings*, 1 East, 98. *Williams* v. *Everett*, 14 East, 582, 7. *Flewellin* v. *Rave*, 1 Bulst. 68.

23. A. being indebted to B. requests C. to pay B. the amount. This C. undertakes to do "provided he receive money on account of A." Money of A. which subsequently comes into the hands of C. is money received to the use of B. *Stevens* v. *Hill*, 5 Esp. 247. Ellenborough, C. J. 1805.

24. S. P. said to have been ruled by Lord Kenyon. *Ibid.*

And see ante, AGENT, 119, 120.

25. But where A. having accepted a bill payable at B.'s banking-house, remits funds to B. after the bill has become due, with directions to pay the amount to the indorsee, and B. tenders the money accordingly to the indorsee, who states that the bill is returned to the indorser in Ireland: the indorsee cannot sue B. on getting the bill again into his possession, A. having, in the mean time, countermanded the payment. *Stewart and another* v. *Fry and Chapman*, Holt. 372. Gibbs, C. J. 1816.

26. *Indebitatus assumpsit* will not lie on a collateral undertaking for the payment of goods sold to a third person. The declaration must be special. *Mines* v. *Sculthorpe*, 2 Campb. 215. Ellenborough, C. J. 1809.

And see 1 Saund. 211. a. b. Plowd. 183.

27. Defendant guarantees to plaintiffs any debts which J. S. *may contract with them for goods not exceeding* 100*l*. This is a continuing guarantee, not confined to one dealing of 100*l*. but extending, within that amount, to successive renewals of the debt. *Merle and others* v. *John Wells*, 2 Campb. 413. Ellenborough, C. J. 1810.

Vide Vinn, Sel. Jur. Quæst. lib. 2 cap. 41.

28. An undertaking by B. to be responsible to A. for any goods he *hath supplied* or *may supply* W. P. to the amount of 100*l*. remains in force after goods to that amount have been delivered and paid for. *Mayson* v. *Pritchard*, 2 Campb. 436. Wood, B. Worcester, 1810.

And the court of K. B. refused a rule for a new trial, after a verdict for the vendor. *Ibid*, and 12 East, 227.

N. Qu. whether this guarantee was valid with respect to the price of the goods *previously* supplied; it not being *expressed*, (5 East, 10,) that these goods were supplied at B.'s *request* (1 Saund. 264, n.)

29. So an undertaking to be answerable to the extent of 300*l*. for any goods supplied to B. remains in force as long as the parties continue to deal on the same footing. *Baston* v. *Bennett*, 3 Campb. 220. Ellenborough, C. J. 1812.

30. Semble, that B. might relieve himself from further liability by giving notice to discontinue his guarantee. *Ibid.*

31. An agent remitting the bills of his principal in payment, writes "I promise to see that the bills be honored." Receiving the bills in payment is a sufficient consideration for this promise. *Morris* v. *Stacey*, Holt. 153. Gibbs, C. J. 1816.

32. A. guarantees to B. the amount of goods to be supplied to C.; in payment of these goods, A. indorses a bill to C., which the latter indorses to B.: before the bill becomes due, A. is bankrupt; the debt is barred by the certificate. *Gaskell and another* v. *Lindsay and another*, Holt. 212. Le Blanc, J. Lancaster, 1816.

B. VALID OR ILLEGAL.

(And see ASSUMPSIT A. (a) 4, A. (b).

33. A. agrees to allow B. poundage upon goods sold by A. to customers recommended by B. The agreement is a fraud upon the customers, and cannot be enforced. *Wyburd* v. *Stanton*, 4 Esp. 179. Ellenborough, C. J. 1802.

See *Bunn* v. *Guy*, 4 East, 190.

34. An agreement by which a party who had been defrauded of goods under false pretences, undertook not to proceed against a person who had received the goods at an under price, was held to be valid. *Drage* v. *Ibberson*, 2 Esp. 643. Kenyon, C. J. 1798.

Acc. *Johnson* v. *Ogilby*, 3 P. Wms. 279. Sed vide *Collins* v. *Blantern*, 2 Wils. 347. And see post, BILLS, B. (b).

35. But an agreement by the payee of a bill to discharge the acceptor in consideration that the drawer will forego an intended motion in K. B. calling upon the payee to answer the matters of an affidavit is corrupt and invalid. *Pool* v. *Bousfield*, 1 Campb. 55. Ellenborough, C. J. 1807.

36. An agreement to pay money in consideration of putting off the trial of an indictment is legal. *Harvey and others, assignees of Harvey*, v. *Morgan and another*, 2 Stark. 17. Ellenborough, C. J. 1818.

And see H. 2, H. 7, fo. 8, pl. 1. F. N. B. 121, F. Fitz. Bar. 124, Plowd. 36, 186. 1 Finch, 148, 2 Finch, 181. *Smith* v. *Everet*' 4 Bro. C. C. 64.

37. An allegation that "the parties entered into a certain agreement," though merely inducement to a declaration for a libel, is not supported by proof of agreement executed when the defendant was in a state of intoxication. *Pitt* v. *Smith*, 3 Campb. '33. Ellenborough, C. J. 1811.

Vide post. 28, § 2.

38. Such an agreement need not be produced in an action for work and labour done in pursuance thereof. *Fenton* v. *Holloway*, 1 Stark. 126. Ellenborough, C. J. 1815.

39. An agreement which contains a stipulation void by the statute of frauds, is void in toto. *Lea* v. *Barber*. Exch. H. T. 1794; 2 Anst. 425, n.

So ruled on the authority of *Cocke* v. *Tombs*. 2 Anst. 420.

Acc. *Chater* v. *Beckett*, 7 T. R. 201.

C. Breach of agreement.

C. (a) *What shall be.*

40. An agreement between a brewer and a publican that the latter shall take all his beer of the former, or pay an advanced rent, cannot be enforced, unless the publican be supplied with good beer. *Holcombe* v. *Hewson*, 2 Campb. 391. Ellenborough, C. J. 1810.

41. And the quality of the beer cannot be proved by shewing what sort of a commodity the plaintiff furnished to other publicans during the same period. *Ibid.*

And see Covenant, B. 1.

42. A provision in a lease for an advanced rent in case the lessee should discontinue purchasing his beer of the lessor was strongly censured by the court. *Cooper* v. *Twibill*, 3 Campb. 286. Ellenborough, C. J. 1808.

43. And a plea in bar to an avowry for such additional rent, stating that the beer supplied was of a bad quality was considered as a meritorious defence. *Ibid.*

44. But where premises are described in the conditions of sale as a "*free* public house," the bargain may be avoided by the purchaser, if it appear that the lease contains a clause of this nature. *Jones* v. *Edney*, 3 Campb. 285. Ellenborough, C. J. 1812.

45. Although the lease be produced and read at the auction. *Ibid.*

And see *Gunnis* v. *Erhart*, 1. H. Bla. 289. *Jenkinson* v. *Pepys*, 6 Ves. 330. *Powell* v. *Edmunds*, 12 East, 6.

C. (b) *How waved.*

46. Where a bankrupt promised to pay a creditor 18*s*. in the pound, in consideration that the latter would not prove under the commission, a petition preferred by the creditor to the lord chancellor against the allowance of the certificate, was held to be a waver of the agreement. *Colls* v. *Lovell*, 1 Esp. 282. Kenyon, C. J. 1795.

47. A. undertakes to guarantee the payment of goods to be manufactured for B. by C. A. wishing to withdraw his guarantee, writes to C. to inquire whether the goods are prepared. Not receiving an immediate answer, he gives up a counter-security. A. is not discharged, if it appear that C.'s silence was occasioned by his absence from home. *Oxley* v. *Young et alt.* 1 Esp. 424. Eyre, C. J. 1795.

48. And the court of C. P. discharged a rule for a new trial, 2 H. Bla. 613.

49. Goods are sold to be paid for on delivery, and the vendor suffers part to be removed without payment, this is only a dispensation *pro tanto*, and he may retain the remainder until the price is paid. *Payne* v. *Shadbolt*, 1 Campb. 427. Ellenborough, C. J. 1808.

ALIEN.

(And see post, BILLS and NOTES, B. (b).)

1. A subject of a neutral state, taken on board an enemy's fleet, may, whilst in confinement, sue upon a contract entered into by him as a prisoner of war. *Sparenburg* v. *Bannatyne*, 2 Esp. 580. Eyre, C. J. 1797.

And the court of C. P. discharged a rule for a new trial. *Ibid*, and 1 *Bos. and Pull.* 163.

And see *Maria* v. *Hall*, 1 Taunt. 33. n.

2. The alien bill (34 Geo. 3. cap. 9.) does not prevent a person from suing here, who resides in France, and who comes over with the intention of returning; though the money recovered cannot be remitted. *Michelotte* v. *Dillon*, 2 Esp. 622. Kenyon, C. J. 1798.

3. An Irishman residing and carrying on trade in an enemy's country, cannot sue here, though naturalized in a neutral state. *O'Mealey* v. *Wilson and another*, 1 Campb. 482. Ellenborough, C. J. 1808.

And see 14 and 15 Hen. 8, cap. 4.

4. And *semble*, that a person domiciled in an enemy's country, is disabled from suing in England, wherever the place of his birth may be. *Ibid.*

And see 14 and 15 Hen. 8, cap. 4. *Sparenburg* v. *Bannatyne*, 1 Bos. and Pull. 163, 7; *M'Connell* v. *Hector*, 3 Bos. and Pull. 113. *Kensington* v. *Inglis*, 8 East, 273; *Flindt* v. *Waters*, 15 East, 260; *Mennett* v. *Bonham*, *ibid.* 477.

5. To a count on a policy of insurance, defendant pleads that the action is brought on the behalf of H. E. a Dane, an alien enemy, not resident within the king's dominions, under letters of safe conduct, *licence*, or protection. Issue on the licence. Held, that a licence from the king to H. E. then an alien friend, authorizing him to undertake a voyage to an enemy's country, and to return to England, does not operate as a licence to reside here, though the voyage did not terminate till after the commencement of hostilities with Denmark, and though he remains here unmolested. *Boulton and another* v. *Dobree*, 2 Campb. 163. Ellenborough, C. J. 1808.

And the court of K. B. refused to set aside nonsuit. *Ibid.*

6. A replication of licence is not supported by evidence of a licence granted under a temporary statute now expired, unmolested residence down to the time of action brought, and licence granted subsequently to the bringing of the action. *Margaret Alciator* v. *Smith*, 3 Campb. 245. Ellenborough, C. J. 1812.

AMENDMENT.

1. The record may be amended at nisi prius, after the cause has been called on, by a rule of court made *instanter* by consent. *Murphy* v. *Marlow and Traunt*, 1 Campb. 57. Ellenborough, C. J. 1807.

And see Blackamore's case, 8 Co. 156, 61 b. *Tite* v. *Bishop of Worcester*, 1 Lord Raym. 94. S. C. 1 Salk. 48. S. C. Comb. 393. S. C. 12 Mod. 107.

Sed vide *Child* v. *Harvey*, 1 Salk. 48. S. C. 1 Lord Raym. 511. *Crowder* v. *Rooke*, 2 Wils. 144.

2. But a material allegation will not be altered there upon an *ex parte* application; as the substitution of an excuse for profert. *Paine* v. *Bustin*, 1 Stark. 74. Ellenborough, C. J. 1815.

3. The omission of the similiter is however immaterial after verdict. *Wright q. t.* v. *Horton*, K. B. 1816, 1 Stark. 400.

ANNUITY.

A. MEMORIAL.

(a) *Form of.*

(b) *How pleaded.*

B. CONSIDERATION WHEN RECOVERABLE.

A. MEMORIAL.

A. (a) *Form of Memorial.*

1. An allegation in the memorial, that the grantee paid the purchase-money

to the grantor, is supported by evidence, that the amount was deposited by the grantee at his banker's, in the name of his attorney, to await the performance of a condition precedent, and that it was subsequently paid over by the attorney. *Coare* v. *Giblet*, 4 Esp. 231. Ellenborough, C. J. 1803.

S. C. not S. P. 3 East, 461.

N. It does not appear whether the payment ought to be considered as made on the day on which the money was deposited with the banker, or on that on which it was paid over to the grantor.

2. Covenant on deed of annuity for 66*l*. 13*s*. 4*d*. plea void under annuity act, for defect of memorials. It had been intended to grant 60*l*. per ann., only the rest being added to pay income tax, while it should last. Held that the agreement to reduce the annuity, on repeal of the income tax, should have been set forth. *Brazier* v. *Homewood*. Ellenborough, C. J. Sittings after E. T. 1818. P.

3. In ejectment by the grantee of an annuity, objected it cannot be that a trustee under the annuity deed had executed, but his execution was not noticed in the memorial. *Doe, dem. Delegal and others* v. *Holloway*, 1 Stark. 431. Ellenborough, C. J. 1816.

And the court refused a rule to enter nonsuit. *Ibid.*

A. (b) *How pleaded.*

4. A plea that the consideration stated in the memorial has not been paid, is negatived by proof of the acceptance by the grantor of a banker's check in payment, though a money consideration be stated in the memorial. *Franco* v. *Lindo*, 1 Esp. 300. Buller, J. 1795.

B. Consideration when recoverable.

5. Where an annuity is set aside by the act of the court, or the grantor, upon the discovery of a defect in the securities, refuses to execute fresh assurances, the purchase money may be recovered in an action for money had and received. *Weddell* v. *Lynam and Jones*, 1 Esp. 309. Kenyon, C. J. 1795.

Acc. *Shove* v. *Webb*, 1 T. R. 732.

And see *Scurfield* v. *Gowland*, 6 East, 241. *Waters* v. *Mansell*, 3 Taunt. 57.

6. But where no steps are taken by the grantor to set aside the annuity, and no application is made to him to execute further assurances, the grantee cannot recover. *Ibid.*

7. S. P. ruled in *Richards* v. *Borrett*, 3 Esp. 102. Kenyon, C. J. 1800.

8. In an action to recover the purchase money of an annuity, the grantor will be allowed to set off the full amount of payments made by him on account of the annuity. *Weddall* v. *Lynam*, *ubi supra.*

9. S. P. ruled in *Hills* v. *Hills*, 4 Esp. 196. Ellenborough, C. J. 1802.

And the court of K. B. refused a rule for a new trial. S. C. (*called Hicks* v. *Hicks*) 3 East, 16. And see *Byne* v. *Vivian*, 5 Ves. 607, 8; 7 Ves. 23, 4; 8 Ves. 136; 9 Ves. 492.

10. But where an annuity, void for want of inrolment, was rescinded by *special agreement*, the grantee was permitted to recover the full purchase money, with interest from the time when the annuity ceased, without deducting the previous payments. *Beauchamp* v. *Borret*, Peake, 109. Kenyon, C. J. 1792.

11. If, in consequence of the defect of the memorial of an annuity, the grantee sue his own attorney for negligence in preparing the assurances, the attorney, after paying his client the consideration, cannot recover it from the grantor. *Burdon gent.* v. *Webb*, 2 Esp. 527. Kenyon, C. J. 1797.

12. Where money is advanced upon an agreement for an annuity, to be charged upon a specific estate, and no steps are taken by the borrower to effect the grant, the amount may be recovered in an action for money had and received. *Richards* v. *Borrett*, *ubi supra.*

13. If to debt on the annuity-bond a defect in the memorial be pleaded, and the plaintiff enter a *nolle prosequi*, he may recover the consideration in an action for money had and received. *Este* v. *Broomhead*, 3 Esp. 261. Kenyon, C. J. 1801.

14. Where an annuity is set aside, the purchase-money is to be considered

as a debt accruing to the grantee at the moment it is paid; it is therefore barred by the certificate of the grantor, who becomes a bankrupt subsequently to the grant of the annuity, though no steps be taken to set it aside until after the certificate. *Walker* v. *Liscarray*, 6 Esp. 98. Ellenborough, C. J. 1807.

And see *Baxter* v. *Nichols*, 4 Taunt. 90; 14 Ves. 574; *Ex-parte* Granger, 10 Ves. 349, 51.

APPRENTICE.

(And see Penal Action A. (a) (c); Witness F.; Agent D. 101.)

1. Indentures of apprenticeship for a less period than seven years, contrary to 5 Eliz. cap. 4, s. 26, may be avoided in a collateral action against a surety for the good behaviour of the apprentice. *Burney* v. *Jennings*, 6 Esp. 8. Ellenborough, C. J. 1806.

S. P. *Guppy* v. *Jennings*, 1 Anst. 256. And see *Ashcroft* v. *Butler*, 6 T. R. 653; *Gray* v. *Cookson*, 16 East, 13.

2. To recover back a premium paid on an indenture, void by 8 Ann. c. 9, § 39, for not stating the true sum, plaintiff must shew that he was not party to the fraud. *Shepherd* v. *Hall*, 3 Campb. 180. Ellenborough, C. J. 1812.

And see Stamps, A. 3. And as to the mode of calculating the premium, see *Rex* v. *Bradford*, 1 M. and S. 151.

ARBITRAMENT.

A. Submission.

B. Award.

(a) *Operation of, upon the matters referred.*

(b) *How enforced.*

(c) *When available in collateral proceedings.*

(d) *How construed.*

C. Arbitrator.

D. Umpire.

A. Submission.

(And see ante, Agent 44, post, B. (b) 8.)

1. Trustees submitting to arbitration do not become personally liable, without proof of assets. *Davies* v. *Ridge and others*, 3 Esp. 101. Kenyon, C. J. 1800.

Sed vide *Barry* v. *Rush*, 1 T. R. 691; *Pearson* v. *Henry*, 5 T. R. 8; *Worthington* v. *Barlow*, 7 T. R. 453.

B. Award.

(And see *Doe* v. *Morpeth*, 3 Taunt. 378.)

B. (a) *Operation of award upon the matters referred.*

2. It is stated to have been ruled, that an award made upon a reference of *all matters in dispute between the parties*, is no bar to a suit upon a cause of action which existed at the time of the reference, unless it be shewn that such cause of action was laid before the arbitrators. *Martin* v. *Thornton*, 4 Esp. 180. Alvanley, C. J. 1802.

S. P. contra *Smith* v. *Johnson*, 15 East, 213.

And see *Bradford* v. *Bryan*, Willes, 268, S. C. 7 Mod. 349; *Ravee* v. *Farmer*, 4 T. R. 146; *Ingram* v. *Milnes*, 8 East, 445; *Crofton* v. *Connor*, 1 Bro. P. C. 530; *Jones* v. *Bennet*, *ibid*, 528; *Elsom* v. *Rolfe*, 2 Smith, 459.

3. But that the arbitrator might be called to prove that the plaintiff claimed an allowance on that account. *Ibid.*

4. And that such proof was admissible under a plea of not guilty, to an action for a malicious arrest. *Ibid.*

And see *Paramore* v. *Johnson*, 1 Lord Raym. 566. S. C. 12 Mod. 376.

5. It is within the jurisdiction of an arbitrator to direct a party to go before a government commissary, and verify vouchers. *Atkyns* v. *Baldwyn*, 1 Stark. 202. Gibbs, C. J. 1815.

B. (b) *How enforced.*

(And see Assumpsit F.; Evidence C. (b).)

6. An award upon a parol submission, may be given in evidence under the count for an account stated. *Kern* v. *Batshore*, 1 Esp. 194. Eyre, C. J. 1794.

7. Or under a count upon the original demand. *Kingston* v. *Phelps*, Peake, 227. Kenyon, C. J. 1794.

8. But to affect the defendant, it must be shewn that the plaintiff was also a party in the submission. *Ibid.*

S. P. *Antram* v. *Chace*, 15 East, 209.

9. In an action on an award, made pursuant to a judge's order, the rule of court made thereon, is sufficient proof of the order without producing it. *Still and another* v. *Halford*, 4 Campb. 17. Ellenborough, C. J. 1814.

B. (c) *When available in collateral proceedings.*

(And see post, Assumpsit F. N.; Evidence C. (c)).

10. An award upon a parol submission of the damages sustained by the plaintiff, may be given by him in evidence in an action of tort; and it can only be resisted by that which would have vitiated the award, if it had been directly in issue. *Baily* v. *Lechmere*, 1 Esp. 377. Kenyon, C. J. 1795.

11. *Semble*, that an award, made after issue joined, cannot be given in evidence under the original pleadings, but must be pleaded *puis darrein continuance*. *Storey* v. *Bloxam*, 2 Esp. 504. Kenyon, C. J. 1796.

And see *Thomlinson* v. *Arriskin*, 1 Com. Rep. 330; *Hawkins* v. *Colclough*, 1 Burr. 275.

B. (d) *How construed.*

12. *Semble*, that upon an award directing the defendant to assign leasehold premises to A. according to law, he cannot be required to execute an assignment to A., his executors, administrators, and assigns. *Russel* v. *Headington*, 1 Stark. 13. Ellenborough, C. J. 1815.

C. Arbitrator.

13. The law raises no *implied* promise to pay an arbitrator for his trouble. *Virany, executor*, v. *Warne*, 4 Esp. 47. Kenyon, C. J. 1801.

And see *Miller* v. *Robe*, 3 Taunt. 461; *George* v. *Lowsley*, 8 East, 13; *Fitzgerald* v. *Graves*, 5 Taunt. 342.

D. *Umpire.*

14. Where the submission is to A. and B., and such third person as they shall appoint, to prove that A. and B. appointed C., it is not enough to shew that C. acted with them in the arbitration, and to put in an award executed by the three, wherein the appointment of C. is recited. *Still and another* v. *Halford*, 4 Campb. 17. Ellenborough, C. J. 1814.

ARREST.

A. On civil process.

(a) *When regular.*

(b) *Protection from arrest.*

(c) *Discharge.*

B. On criminal charges.

(a) *By warrant.*

(b) *Without warrant.*

A. On civil process.

A. (a) *When regular.*

1. A dwelling situated over a stable in an inclosed yard, is shut in from the stable and yard by a door at the top of a staircase. An officer who has gained admission to the yard, cannot justify the breaking open of such door in the execution of civil process. *Hopkins* v. *Nightingale, et alt.* 1 Esp. 99. Kenyon, C. J. 1794.

Acc. 3 Inst. 63.

Sed vide *Lee* v. *Gansell*, Gowp. 1.

And see 4 Taunt. 407, *Burdett* v. *Abbott.*

2. A defendant cannot be arrested by original between the return day of the writ and the *quarto die post*. *Parrot* v. *Mumford, sheriff of Kent*, 2 Esp. 585. Eyre, C. J. Maidstone, 1797.

A. (b) *Protection from arrest.*

3. If a bankrupt surrender within the forty-two days, the commissioners may

enlarge the time for taking his examination, without an order from the chancellor; and the privilege from arrest extends to such enlarged time. *Davis v. Trotter, sheriff of Surrey*, 3 Esp. 40. Kenyon, C. J. 1799.

And a nominal verdict having been taken against the sheriff for an escape, the court of K. B. directed a nonsuit to be entered. *Ibid*, and 8 T. R. 475.

Acc. *ex parte* Jackson, 15 Ves. 116.

And see *ex parte* Johnson, 14 Ves. 36. *Ex parte* Higginson, 12 Ves. 496.

4. A bankrupt attending a dividend meeting several years after his last examination is privileged from arrest. *Arding v. Flower and Blackhall*, 3 Esp. 117. Kenyon, C. J. 1800.

S. C. 8 T. R. 534.

5. Though he attend upon a notice from the messenger without a summons from the commissioners. *Ibid*.

6. Defendant in a civil suit, is protected in coming to attend the trial. *Solomon v. Underhill*, 1 Camph. 229. Ellenborough, C. J. 1808.

S. P. *Lightfoot v. Cameron*, 2 Bla. 1113.

And see *Childerston v. Barrett*, 11 East, 439; Tidd, 196.

Sed vide Practice, I. (b) 2.

7. And if he be arrested *eundo*, the judge will grant a *habeas corpus* to discharge him. *Ibid*.

And see Tidd, 5th ed. 784; 6th ed. Bro. Abr. 6 tit. Privileges, &c. *per totam*. And will put off the trial. *Ibid*.

8. But this must be upon payment of costs; unless it appear that the plaintiff colludes with the arresting creditor. *Ibid*.

A. (c) *Discharge*.

9. A sheriff is not bound to discharge the defendant, unless he receive a *written* discharge from the plaintiff. *Taylor v. Brander and Tebbs, sheriffs of London*, 1 Esp. 45. Kenyon, C. J. 1793.

10. And after receiving such discharge, he may detain the party a reasonable time, to search the office for other writs against him. *Ibid*.

11. And twenty-four or twenty-six hours will not be considered an unreasonable delay. *Ibid*.

12. The officer is not bound to make the search until the written discharge arrives. *Ibid*.

B. On criminal charges.

B. (a) *By warrant*.

13. The father of a bastard brought before a magistrate and liberated on condition that he find sureties, may, if he neglect to procure them, be retaken upon the same warrant, provided the magistrate be alive. *Dickinson v. Brown, et alt.* 1 Esp. 218, and Peake, 234. Kenyon, C. J. 1794.

14. A warrant to arrest a person, "that he may be bound to appear at the *next* session of Oyer and Terminer," may be executed at any time. *Mayhew v. Hill, et al.* 2 Esp. 683. Kenyon, C. J. 1798.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid*, and 8 T. R. 110.

B. (b) *Without warrant*.

15. A constable may of his own authority take a party into custody for a mere assault committed in his presence, *Coupey v. Henley, Whale and Webster*. 2 Esp. 540. Eyre, C. J. 1797.

16. But, if he were not present at the affray, he cannot arrest without a warrant, unless there be ground for supposing that a felony will ensue. *Ibid*.

ASSUMPSIT.

(And see Limitation of actions A.)

A. Consideration.

(a) *Where insufficient*.

(b) *Illegal*.

B. Indebitatus for work and labour.

C. Indebitatus, where maintainable in respect of special contract.

D. Indebitatus for money paid.

(a) *By surety against principal*.

(b) *Against co-surety*.

(c) *On the other implied promises*.

E. INDEBITATUS FOR MONEY HAD AND RECEIVED.

(a) *To try the right to an office.*

(b) *To recover money paid by mistake.*

(c) *Upon failure of consideration.*

(d) *Upon rescinding the contract.*

(e) *To recover money obtained by fraud.*

(f) *For money paid by one party to an illegal contract to the other.*

(g) *For money paid by constraint.*

(h) *For money paid under legal process.*

F. NON ASSUMPSIT.

A. CONSIDERATION.

A. (a) *Where sufficient.*

1. A promise, without any new consideration, to give time for the payment of a pre-existing debt, is not binding. *De Symons* v. *Minchwich*, 1 Esp. 430. Eyre, C. J. 1795.

Sed vide, AGREEMENT, A. (a) 1.

And see PLEADING, H. (b) 1.

2. Where the abandonment of a contract is the consideration of a new promise, it must be shewn that the former was such as might have been enforced. *Walker* v. *Constable*, 2 Esp. 659. Eyre, C. J. 1798.

And the court of C. P. refused to set aside nonsuit. *Ibid*, and 1 Bos. and Pul. 306. See page 22, § 4. 60 § 9.

3. Assumpsit will not lie upon an *implied* promise to pay an *arbitrator* for his trouble. *Virany, executor,* v. *Warne*, 4 Esp. 47. Kenyon, C. J. 1801.

4. A. being possessed of information respecting a sum of money due to B. as a residuary legatee, obtains a promise of ten per cent. as the price of the communication. *Semble*, that the agreement cannot be enforced against B. *Jones* v. *Brindley*, 3 Esp. 205. Kenyon, C. J. 1800.

But it appears, from the report of this case, in 1 East, that the defendant was nonsuited on the form of his special count.

5. After A. has paid the whole of a demand made by B., part of which was due to C. B. engages to indemnify A. against any claim by C., the consideration is sufficient. *Lord Suffield* v. *Bruce*, 2 Stark. 175. Ellenborough, C. J. 1817.

6. East India lieutenants returning home on a sick certificate, are to pay one thousand rupees and no more, "for their passage and accommodation at the captain's table." Without an express promise, an officer, under these circumstances, is not liable to pay more than the regulation price, though he has a cabin to himself, and others, for the same indulgence, pay an advanced price; it not appearing that the cabin would have been let to any other person. *Adderley* v. *Cookson*, 2 Campb. 15. Ellenborough, C. J. 1809.

A. (b) *Illegal.*

7. No action lies for the price of libellous or immoral prints. *Fores* v. *Johnes*, 4 Esp. 97. Lawrence, J. 1802.

And see TRESPASS, B. 6, 7.

8. Where premises are let for the express purpose of prostitution, no action can be maintained for the rent. *Girardy* v. *Richardson*, 1 Esp. 13. Kenyon, C. J. 1793.

S. P. *Crisp* v. *Churchill*, Selw. 65.

Acc. *Howard* v. *Hodges*, *ibid.*

Sed vide *Lloyd* v. *Johnson*, 1 Bos. and Pul. 340.

9. A person who sells articles of dress to a woman of the town, may maintain an action for the amount, though he had notice of her situation; unless it can also be shewn that he expected to be paid out of the profits of her prostitution, or that the clothes were furnished for the purpose of enabling her to carry it on. *Bowry* v. *Bennett, spinster*, 1 Campb. 348. Ellenborough, C. J. 1808.

10. An agent employed to purchase shares in an unchartered joint-stock company, fraudulently obtains from his employer double the premium paid. The transaction being prohibited by 6 Geo. 1, cap. 18. both parties are *in pari delicto*; and no action will lie to recover the excess of premium. *Buck* v. *Buck*, 1 Campb. 547. Mansfield, C. J. 1808.

And see *Rex* v. *Dodd*, 9 East, 516. post E. (e).

B. INDEBITATUS FOR WORK AND LABOUR.

(And see ARBITRAMENT, C.)

11. In an action for work and ma-

terials, evidence of the badness of the workmanship is admissible in reduction of the demand. *Farnsworth* v. *Garrard*, 1 Campb. 38. Ellenborough, C. J. 1807.

And see ante ACTION, E.; post, PLEADING C. (c).

12. And where a wall is so badly built that it must be pulled down, the defendant will be entitled to a verdict. *Ibid.*

Acc. *Havelock* v. *Geddes*, 10 East, 555.

And see *Davidson* v. *Gwynne*, 12 East, 381.

13. Unless the value of the materials exceed the expense of removing them; in which case the builder may recover the difference. *Ibid.*

14. An auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Denew* v. *Daverck.* Ellenborough, C. J. 1813, 3 Campb. 451.

15. Upon the delivery of trade utensils contracted for at a certain price, and as of a certain quality, the vendee may reject them after a reasonable trial, giving notice to the vendor to remove them. *Okell* v. *Smith and another*, 1 Stark. 107. Bayley, J. 1815.

16. If the goods are not sent back, and no notice is given to take them away, the vendee must pay *quantum valebant. Ibid.*

17. In an action by heralds for making out defendant's pedigree, they are bound to give some general evidence that the pedigree is true, or made out according to the laws of heraldry; unless such proof have been dispensed with by the acts of the defendant. *Townsend and another* v. *Neale*, 2 Campb. 191. Ellenborough, C. J. 1809.

18. In an action for work, &c. in ornamenting a house, defendant may inquire into the prices paid by the plaintiff to artists employed under him, as a criterion of the fairness of the demand. *Fricker* v. *French*, 5 Esp. 79. Ellenborough, C. J. 1803.

19. A count for *work and materials* will cover a demand for attendances as a farrier, and for *medicines* administered. *Clark* v. *Mumford*, 3 Campb. 37. Ellenborough, C. J. 1811.

Acc. *Wood* v. *Grace*, Barnes, 344.

20. A clerk retained by the quarter, may sue for the balance of the quarter, in the middle of which he had been discharged, unless a dissolution of the contract proved. *Gandall* v. *Pontigney*, 1 Stark. 198. Ellenborough, C. J. 1815.

21. An action lies for brokerage in procuring a medical partnership for defendant. *Edgar* v. *Blick*, 1 Stark. 464. Ellenborough, C. J. 1816.

C. INDEBITATUS, WHERE MAINTAINABLE IN RESPECT OF SPECIAL CONTRACT.

22. A servant hired by the quarter, discharged without cause in the middle of a quarter, may recover the wages for the whole quarter in *indebitatus assumpsit. Gandell* v. *Pontigney*, 4 Camp. 375. S. C. 1 Stark. 118. Ellenborough, C. J. 1816.

23. Where goods delivered on *sale or return* are not returned within a reasonable time, the value may be recovered in an action for goods sold and delivered. *Bailey* v. *Goldsmith*, Peake, 56. Kenyon, C. J. 1791.

24. Agreement for three months credit, and then if further time wished, a bill at three months, *indebitatus assumpsit* lies at the end of the first three months, if no bill given. *Nixon* v. *Jepson*, 2 Stark. 227. Ellenborough, C. J. 1817.

25. Where an agreement for sale is unsigned and unstamped, the purchaser may recover the deposit on the common counts. *Adams* v. *Fairbairn*, 2 Stark. 277. Abbott, J. 1817.

26. So if the vendor of an estate have not such a title as by the conditions of sale he engaged to make. *Farrer* v. *Nightingale*, 2 Esp. 64[illegible]. Kenyon, C. J. 1798.

And see *Johnson* v. *Johnson*, 3 Bos. and Pul. 162, 6; *Cripps* v. *Reade*, 6 T. R. 606; *Giles* v. *Edwards*, 7 T. R. 181.

27. Unless the terms of a special agreement, either by express stipulation, or necessary intendment preclude the party from recovering for work and labour generally, he is entitled after the contract has been executed, and the day of payment is arrived, to declare gene-

rally. *Robson* v. *Godfrey and Thomas*, Holt. 236. Gibbs, C. J. 1816.

And see *Ellis* v. *Hamlyn*, 3 Taunt. 52; *Guy* v. *Gore*, 2 Marsh. 273.

28. A consignee who, in order to obtain possession of his goods, pays freight according to the gross weights expressed in the margin of the bill of lading, may recover the excess beyond the freight on the net weights. *Geraldes* v. *Denison*, Holt. 346. Gibbs, C. J. 1816.

And see *Brown* v. *Hodgson*, 4 Taunt. 189.

29. Assumpsit for the price of a gun upon contract, to receive in payment another gun, and fifteen guineas over; held, that on defendant's refusal to deliver the other gun, a contract resulted to pay the whole price in money. *Forsyth and others* v. *Jarvis*, 1 Stark. 437. Ellenborough, C. J. 1816.

30. Upon an agreement to pay for goods by bill at two months, to be given at the end of one, the plaintiff may declare generally after the expiration of the three months. *Heron* v. *Granger*, 5 Esp. 269. Ellenborough, C. J. 1805.

S. P. *Brooke* v. *White*, 1 N. R. 330; *Marshall* v. *Poole*, 13 East, 98.

And see Agent.

31. Mariners are to receive a share of the net proceeds of the voyage, in case of faithful service, &c.—Money had and received will not lie against the owner, who has disposed of the cargo for the benefit of all concerned, unless an admission of faithful services, &c., can be shewn. The declaration should otherwise be special, averring performance of the conditions. *Evans* v. *Bennet*, 1 Campb. 300. Ellenborough, C. J. 1808.

32. Defendant having contracted to finish houses in return for cordage sold, subsequently agreed that plaintiff should finish at defendant's expence. Held, that although nothing could be recovered which was part of this agreement, without a special count; yet plaintiff could, under the common count, recover for excess of cordage supplied beyond the agreement. *Dunn* v. *Body*, 1 Stark. 220. Ellenborough, C. J. 1815.

33. But *semble*, that the amount to be delivered under the agreement must have been adjusted. *Ibid.*

34. If goods be sold to be paid for partly in money, and partly in goods, the vendor, after receiving the goods, cannot declare generally for the balance, but must sue on the special contract. *Palver and another* v. *West*, Holt. 178. Gibbs, C. J. 1816.

35. Upon agreement to barter goods for goods, the balance is recoverable in money. *Ingram* v. *Shirley*, 1 Stark. 185. Ellenborough, C. J. 1815.

36. An outgoing tenant cannot declare for *goods* sold, against the incoming tenant, upon an *executed* agreement to take the *fixtures*. *Nutt* v. *Butler*, 5 Esp. 176. Ellenborough, C. J. 1804.

S. P. *Lee* v. *Risdon*, 7 Taunt. 188.

37. Mariners are to receive a share of the net proceeds of the voyage, in case of faithful service, &c. Money had and received will not lie against the owner, who has disposed of the cargo for the benefit of all concerned, unless an admission of faithful services, &c. can be shewn. The declaration should be special, averring performance of the conditions. *Evans* v. *Bennet*, 1 Campb. 300. Ellenborough, C. J. 1808.

See Action D (c) Bills and Notes I. (d) Gaming A. (a) 2 n; Vendor and Purchaser, C. 1, 2, 8, 9, 10, D. 2. F. 3.

38. Held, that a lender who has received a gun as a security, may recover in an an action for money lent, without first returning or tendering the gun. *Lawton* v. *Newland*, 2 Stark. 73. Ellenborough, C. J. 1817.

Contra, Plowd. And see MSS. Yearbook of Edw. I., in L. I. Library, where the defendant having pleaded that she had deposited jewels as a security, which plaintiff had not returned, the court refused to give judgment for the plaintiff, saying that they had no power to award restitution of the property.

D. Indebitatus for money paid.

D. (a) *By surety against principal.*

(And see Limitation A. (b) 3.)

39. An accommodation acceptor who defends an action at the request of the drawer, may recover the costs as money

paid to the use of the latter without an undertaking in writing. *Howes* v. *Martyn*, 1 Esp. 162. Kenyon, C. J. 1794.

And see F. N. B. 103 B; ib. 122 K.; ib. 135 A.; ib. 162 C.; ib. 234, 5; *ex parte* Marshall, 1 Atk. 130.

And it seems that the drawer is liable for such costs without a request. *Jones* v. *Brooke*, 4 Taunt. 464.

40. In an action for contribution against a co-surety, a declaration by the obligee, as to the account to which he carried money paid him by the principal obligor, is not evidence, unless the declaration were made at the time of payment; the obligee must be called. *Dunn* v. *Slee*, Holt. 399. Park, J. 1816.

41. A. gives his promissory note for the debt of B., which the creditor accepts in satisfaction.—Held, that A. may immediately sue B. *for money paid to his use*. *Barclay and Proctor* v. *Gooch*, 2 Esp. 571. Kenyon, C. J. 1797.

Si mandato meo fundum emeris, utrum quum pretium dederis ages mecum mandati, AN ET ANTEQUAM DES? *Et recte dicitur, in hoc esse mandati actionem, ut suscipiam obligationem quæ adversus te venditori competit.* Dig. 45.

Sed vide *Taylor* v. *Higgins*, 3 East, 169.

And see *Nightingale* v. *Devisme*, 2 Bla. 684; S. C. 5 Bur. 2592; *Jones* v. *Brodey*, 1 East, 1.

42. Bail above may recover against the principal any sum which they have fairly expended in endeavouring to take him. *Fisher* v. *Fallows*, 5 Esp. 171. Ellenborough, C. J. 1804.

S. P. Cod. 1. 35. 2.

43. But they cannot recover costs which have been occasioned by them, unadvisedly resisting the payment of those expences. *Ibid.*

And see *Duffield* v. *Scott*, 3 T. R. 274. 7.

And see Fitz. Abr. Pledges 9; *Parson* v. *Briddock*, 2 Vern. 608; *Philips* v. *Biggs*, Hardres, 164; *Merryweather* v. *Nixon*, 8 T. R. 186; *Wright* v. *Morley*, 11 Ves. 12; F. N. B. 103 B; *ibid.* note b; 5 Vin. Abr. Contribution; Bac. Abr. Obligation, D. 5; post D. (c) 14: F. N. B. 162, C. D.

D. (b) *Against a co-surety.*
(And see ACTION, C (a) *b.*)

44. A., at the request of B., joins him in giving security for the debt of C.; B. is compelled to pay the whole; he cannot sue A. for a contribution. *Turner* v. *Davies*, 2 Esp. 478. Kenyon, C. J. 1796.

Sed vide Cooke's case, 2 Freem, 97, pl. 107; F. N. B. 121. I.

45. So where a sale-note does not specify any time for delivery, evidence of a verbal agreement, or of an usage in the trade for removing the goods immediately, is not admissible. *Greaves* v. *Asklin*, 4 Campb. 426. Ellenborough, C. J. 1816.

And see Mildmay's case, 1 Rep. 176b; *Motter* v. *Living*, 4 Taunt. 104; *Powell* v. *Edmunds*, 12 East, 10; *Cuff* v. *Penn*, 1 M. and S. 27.

46. Time given to one co-surety does not discharge the rest. *Dunn* v. *Slee*, Holt. 399. Park, J. 1816.

D. (c) *On other implied promises.*

47. A sheriff's officer who pays the debt to the plaintiff, in consequence of the neglect of the defendant's attorney to put in bail according to his undertaking, cannot recover the amount, without shewing the defendant's consent to the payment, or the issuing of an attachment against the sheriff. *Griffin* v. *Roberts*, 1 Esp. 383. Eyre, C. J. 1795.

48. And it was doubted whether or not the action could have been maintained, had such proof been produced. *Ibid.*

N. That no action will lie, see *Fuller* v. *Prest*, 7 T. R. 109; *Parker* v. *England*, 2 Smith, 52; S. C. Tidd, 122.

49. But an officer who discharges the defendant, on payment of the sum indorsed and costs, and afterwards, to prevent an attachment, pays the original plaintiff the residue of his demand beyond the sum sworn to, may recover the amount as money paid to the defendant's use. *Cordron* v. *Lord Massareene*, Peake, 143. Buller, J. 1792.

50. A. being in the Fleet on mesne process, at the suit of B., the latter countermands a written authority for his discharge. The warden imagining that such an authority is not revocable, discharges the defendant; and is sued for an escape. He has no remedy over

against A., having been guilty of a breach of duty. *Eyles* v. *Faikney*, Peake, 144, n. Kenyon, C. J. 1792.

And the court of K. B. discharged a rule for a new trial; *ibid.*

And see 8 East, 172. n. S. C. differently reported.

51. Though in a former case it had been held that if after a voluntary escape the sheriff was obliged to pay the debt, he might recover the amount as money paid to the debtor's use. *Morris* v. *Bulkley, (or Berkley,)* Peake, 144. n. Yates, J. assisted by Gould, J. Worcester.

S. C. 8 East, 172. n.

52. If in consequence of the defect of the memorial of an annuity, the grantee sue his own attorney for negligence, and recover from him the amount of the consideration, it is not money paid to the use and at the *request* of the grantor. *Burdon, gent.* v. *Webb*, 2 Esp. Kenyon, C. J. 1797.

53. An action is brought by the vendee of an estate against the auctioneer, to recover the deposit. The principal not coming in to defend *after notice*, the auctioneer pays the deposit, *the interest, the duty*, and the *costs of suit*, to the vendee. The auctioneer may recover *the interest and duty* as money paid to the use of the vendor, but must declare specially for the *costs*. *Spurrier* v. *Elderton, one, &c*, 5 Esp. 1. Ellenborough, C. J. 1809.

And see *Moore* v. *Pyzke*, 11 East, 52; Vendor and Purchaser, E.

As to the effect of the notice, see 3 T. R. 377; Y. B. 10, H. 6, 26 ab. F. N. B. 135 A.; Fitz. Abr. Garranty de Charters, 9, 16, Pothier, Contrat de Vente, part 2, chap. 1, sect. 2, num. 95: *Maydew* v. *Forrester*, 5 Taunt. 615.

55. A candidate at an election for members of parliament is liable for no expenses except such as are imposed upon him by positive statute, or by his own consent, express or implied. *Morris* v. *Burdett, bart.*, 1 Campb. 218. Ellenborough, C. J. 1808.

56. A candidate is liable to the sheriff for his proportion of the expense incurred in administering the oaths of allegiance and supremacy, under 34 Geo. 3. cap. 73. upon the requisition of another candidate, this statute not being confined to county elections. *Morris* v. *Burdett, bart.*, 2 Campb. 218. Ellenborough, C. J. and K. B. 1808.

57. But a candidate for the representation of a city or borough, is not liable for hustings erected without his own consent, or that of his agents. *Ibid.*

58. *Secus* in a county election, where the candidate is made liable by 18 Geo. 2. cap. 18. s. 7. *Ibid.*

59. A. declares to the sheriff that a particular candidate disclaims all participation in the expenses of the election, and, at the same time, requires tickets of admission to the hustings for the friends of that candidate. If the candidate admit A.'s authority, he is bound by such demand to contribute to the expense of erecting the hustings. *Ibid.*

60. And if the authority be denied, the disclaimer must pass for nothing. *Ibid.*

61. In such case, proof that the hustings have been used by persons, whose acts the candidate has adopted, will be sufficient to make him liable. *Ibid.*

62. The goods of A. are taken in execution at the suit of B. after a secret act of bankruptcy, and the money levied is paid over to B. The assignees recover in trover against B., the sheriff, and the bailiff; and the damages and costs are paid by the bailiff; B. is not bound to indemnify the bailiff, or to contribute for money in respect of the damages and costs. *Wilson* v. *Milner*, 2 Campb. 452. Ellenborough, C. J. 1801.

And see *Philips* v. *Biggs*, Hardres. 164; F. N. B. 162. C. D.

63. But the levy money may be recovered, being money paid over to the defendant under a mistake, when the bailiff was ignorant of A.'s bankruptcy and of the right of the assignees to the amount. *Ibid.*

64. Goods come to A., a wharfinger, consigned to B. C., believing them to be meant for himself, carries them away and uses them. A. pays B. the value of the goods. This is not money paid for C.'s use. *Sills and others* v. *Laing*, 4 Campb. 81. Ellenborough, C. J. 1814.

65. A dinner is ordered by a person authorized by the parties to a wager, and the winner pays the amount of the tavern bill; it is money paid to the use of the loser. *Hussey* v. *Crichett*, 3 Campb. 168.

Mansfield, C. J. 1811. and C. P., E. 1812.

66. Assumpsit does not lie against a trustee for creditors until the proportions have been ascertained. *Robson* v. *Andrade*, 1 Stark. 372. Ellenborough, C. J. 1816.

E. INDEBITATUS FOR MONEY HAD AND RECEIVED.

And see AGENT A, 10.

E. (a) *To try the right to an office.*

67. An officer who has power to appoint a deputy, cannot recover fees received by an intruder into the office of deputy, where the fees payable to the principal and the deputy are distinct. *Green* v. *Hewitt*, Peake, 182. Kenyon, C. J. 1793.

And see F. N. B. 179, K. note a.

And as to the origin of this mode of trying the title, see *Howard* v. *Wood*, T. Jon. 126, 7, 8; S. C. 2 Show 21, 4; S. C. 2 Lev. 145; *Earl of Mountague* v. *Lord Preston*, 2 Vent. 170, 1: *Rains* v. *Commissary of diocese of Canterbury*, 7 Mod. 147.

E. (b) *To recover money paid by mistake.*

And see INSURANCE, E. (d).

68. Money paid by mistake to the trustees of an insolvent estate, cannot be recovered from the trustees after they have made a final dividend. *Fydell* v. *Clark et alt.* 1 Esp. 447. Kenyon, C. J. 1796.

69. Held that to recover from assignees the amount of a bill sent to the bankrupt for a specific purpose, it must be shewn that the product of the bill actually came into the hands of the defendants, *with knowledge of the appropriation. Kieran* v. *Johnson and another, assignees of Macmaster*, 1 Stark. 109; Bayley, J. 1815.

But see BANKRUPT, F. (c).

70. An over payment of freight occasioned by the difference between the weights, expressed by the bill of lading and the real quantity, may be recovered back. *Geraldes* v. *Denison*, Holt. 346. Gibbs, C. J. 1816.

71. This action will not lie against a party to whom the plaintiff's bankers have paid by mistake a sum of money which the plaintiff lodged with them for a specific purpose; as there is no privity of contract between the parties, and the plaintiff's claim on his banker is not affected by such payment. *Rogers* v. *Kelly*, 2 Campb. 123. Ellenborough, C. J. 1808.

And see *Price* v. *Nede*, 3 Burr. 1354; S. C. 1 Bla. 390.

72. The sheriff may recover back money levied after an act of bankruptcy, and paid over to the party at whose suit the execution issued. *Wilson* v. *Milner*, 2 Campb. 452. Ellenborough, C. J. 1810.

73. Interest was held to be recoverable upon a count stating the loss of the use of deposit on the purchase of an estate to which no title could be made. *De Bernales* v. *Wood*, 3 Campb. 258. Ellenborough, C. J. 1812.

Sed vide Sugden.

74. Money cannot be recovered from a person who would, after such recovery, have a claim against the plaintiffs to the same amount, for damages occasioned by their negligence as his factors in the particular transaction. *Simpson and another* v. *Swan*, 3 Camp. 291. Ellenborough, C. J 1812.

75. A client paying the whole of his attorney's bill, and then taxing it, cannot recover the difference. *Gower* v. *Popkin*, 2 Stark. 85. Ellenborough, C. J. 1817.

E. (c) *Upon failure of consideration.*

76. In an action against A. for the value of fixtures sold by him without title, it is no defence that A. paid B., the former tenant, for them, and sold them *bona fide* to the plaintiff. *Robinson* v. *Anderton*, Peake, 94. Kenyon, C. J. 1791.

Sed vide *Bree* v. *Holbeck*, Dougl. 630, 54.

And see Dig. 12, 6, 37; Pothier, Traité de l'action condictio indebiti, part 3, sect. 2, art. 1, num. 143.

77. But A. will have an action over against B., and may *perhaps* recover the costs of the first action. *Ibid.*

And see *Kenricke* v. *Burges*, Fra. Moore, 126.

78. Assumpsit for *money* had and received, does not lie against the finder of bank notes, without proof that he has converted them into money. *Noyes* v. *Price and another.* Select Cases, 242. Guildhall, 1776.

79. Money advanced on account to a manufacturer who executes an order in an insufficient manner, cannot be recovered in indebitatus assumpsit. *Cartwright* v. *Rowley*, 2 Esp. 723. Kenyon, C. J. 1799.

80. In an action to recover back a deposit upon the purchase of an estate, it is not sufficient for the plaintiff to shew that he has been advised by conveyancers not to accept the title; the defect of title must be proved. *Camfield* v. *Gilbert*, 4 Esp. 221. Ellenborough, C. J. 1803.

81. In such an action the expenses incurred in investigating the title cannot be recovered; except, *perhaps*, where the plaintiff declares specially. *Ibid.*

S. C. not S. P. 3 East, 516.

82. But it has been since admitted, that where the plaintiff declares specially he is entitled to recover such expense. *Turner* v. *Beaurain*, Sugd. Vend. and Purch. 193. Ellenborough, C. J. 1806.

83. And it had been before so ruled in *Richards* v. *Barton*, 1 Esp. 268. Kenyon, C. J. 1795.

Acc. *Flureau* v. *Thornhill*, 2 Bla. 1078; post VENDOR, E. 2, 4.

E. (d) *Upon rescinding contract.*

84. An action cannot be maintained to recover back money deposited with a stakeholder upon a wager left to his decision, after the wager has been determined against the plaintiff. *Brandon* v. *Hibbert*, 4 Campb. 37. Dampier, J. 1814.

E. (e) *To recover money obtained by fraud.*

85. A. having obtained a bill from B. upon false pretences, becomes a bankrupt, and his assignees receive the amount. This is money received to the use of B. *Harrison* v. *Walker and another, assignees, &c.* Peake, 111. Kenyon, C. J. 1792.

And see *Willis* v. *Freeman*, 12 East, 656.

86. *Semble*, that this action lies against an infant for money embezzled by him. *Bristow and others, assignees*, v. *Eastman*, Peake, 223, and 1 Esp. 172. Kenyon, C. J. 1794.

And see *Jennings* v. *Rundall*, 8 T. R. 335.

87. Where A. advances money to B. to be returned to him in three months, unless B. within that time procure an appointment, which B. *knows* to be unattainable, A. may recover the amount without waiting for the expiration of the three months. *Hogan* v. *Shee*, 2 Esp. 522. Kenyon, C. J. 1797.

88. *Semble*, that if a legatee obtain payment from the executor by fraud, the latter may recover back the amount; as the defendant's right to the money depends upon a question which is not of common-law cognizance. *Crockford* v. *Winter*, 1 Campb. 124. Ellenborough, C. J. 1807.

E. (f) *For money paid by one party to an illegal contract to the other.*

89. *Semble*, that no action will lie to recover money paid for procuring an office under government though the treaty be broken off. *Pickard* v. *Bonner*, Peake, 221. Kenyon, C. J. 1793.

S. P. *Symonds* v. *Dixon*, K. B. E. T. 1803, 1 Law Journal, 310.

Sed vide *Walker* v. *Chapman*, Lofft. Dougl. 471; *Tappenden* v. *Randall*, 2 Bos. and Pul. 467; *Williams* v. *Hedley*, 8 East, 378, 81, n. 2; *Aubert* v. *Walsh*, 3 Taunt. 279; *Whittingham* v. *Burgoyne*, 3 Anst. 900.

90. Or money paid to procure a pardon. *Norman* v. *Cole*, 3 Esp. 253. Eldon, C. J. 1800.

Contra, *Wilkinson* v. *Kitchen*, 1 Lord Raym. 89.

91. A party who *knowingly* enters into an illegal contract, cannot recover the money which he has paid in pursuance of such contract. *Drummond* v. *Decy*, 1 Esp. 152. Kenyon, C. J. 1794.

Acc. *Booth* v. *Hodgson*, 6 T. R. 405; *Mitchell* v. *Cockburn* 2 H. Bla. 379; *Branton* v *Teddy*, 1 Taunt. 6; *Clarke* v. *Shee*, Cowp. 197, 200; *Browning* v. *Morris*, *ibid*, 790; *Lowry* v. *Bourdieu*, Dougl. 451; ante A. (b).

Sed vide *Tenant* v. *Elliott*, 1 Bos. and Pul. 3; *Farmer* v. *Russel*, *ibid*, 297; *Jaques* v. *Golightly*, 2 Bla. 1073; *Jaques* v. *Withy*, 1 H. Bla. 65.

And see *Davis* v. *Edgar*, 4 Taunt. 63; *Claridge* v. *Hoare*, 14 Ves. 59.

92. Where, upon lottery insurances, the assured has received upon losses, a sum exceeding the amount of the premiums paid, he cannot recover the premiums. *King* v. *Scrape*, 1 Esp. 432. Kenyon, C. J. 1795.

93. If A. insure numbers in the lottery with B. who re-insures with C., A. cannot recover the amount of the premium from C. *Ibid.*

94. A. agrees to share with B. in an illegal wager, which the latter has made with C.: upon the wager being decided in favour of B., he pays A. his share, but never receives the amount from C., who destroyed himself. *Semble*, that B. may recover from A. the amount of the money so paid. *Simpson* v. *Bliss*, Holt, 273. Gibbs, C. J. 1816.

94. If the father of an apprentice seek to recover back a sum paid upon the execution of an indenture of apprenticeship, void by 8 Ann. cap. 9. s. 39. for not truly expressing the premium, he must shew that he was imposed on by the defendant. *Shepherd* v. *Hall*, 3 Campb. 180. Ellenborough, C. J. 1812.

E. (g) *For money paid by constraint.*
(And see AGENT, E; BASTARD, A. (b)).

96. Money paid upon a threat of an action, and upon a refusal to communicate facts, which, if disclosed, would have furnished a good defence, may be recovered back. *Hodgson* v. *Williams*, 6 Esp. 29. Mansfield, C. J. 1806.

Acc. Dig. 12. 6. 65. 1. And see post, BASTARD, A. (b).

And see *Chatfield* v. *Paxton*, 2 East. 471, n.; Chitty on Bills, 249, S. C. at Nisi Prius.

97. But a *voluntary* payment of an illegal demand, without an immediate and urgent necessity, as for the redemption or preservation of person or goods, cannot be recovered back. *Fulham* v. *Down*, 6 Esp. 26, n. Kenyon, C. J. 1798.

F. (h) *For money paid under legal process.*

(And see EXECUTION, A. (c) 2.)

98. An overpayment of rent under a distress, cannot be recovered as money had and received by the landlord to the tenant's use. *Knibbs* v. *Hall*, 1 Esp. 84. Kenyon, C. J. 1794.

Recognized in *Lothian* v. *Henderson*, 3 Bos. and Pul. 530.

S. P. in the case of a distress, damage feasant. *Lindon* v. *Hooper*, Cowp. 414.

Acc. Pothier, Traité de l'action condictio indebiti, part 3, sect. 2, art. 2, num. 157. But see Rast. 576, 7, pl. 5; 7 H. 5, 7, n. cited F. N. B. 10 C. (a).

99. A. being sued by B. [illegible] more than he conceives to be due, telling B. that he does it without prejudice, and that he shall bring an action for the difference. A. cannot recover the overpayment. *Brown* v. *M'Kinally*, 1 Esp. 279. Kenyon, C. J. 1795.

And see *Kemp* v. *Prior*, 7 Ves. 237; *Snowball* v. *Vicaris*, Bunb. 175; *Vernon* v. *Minshall*, *ibid.* 178; *Anstruther* v. *Christie*, *ibid.*: *Watts* v. *Robinson*, *ibid.* 229; 1 Vernon, 176; Dig. 12, 6, 35; 12, 6, 50.

100. A. being sued by B. gives a cognovit, but afterwards produces a receipt, which B. refuses to allow, contending that it is a forgery; A. pays the debt; the amount cannot be recovered. *Marriott*, *gent.* v. *Hampton*, 2 Esp. 546. Kenyon, C. J. 1797.

101. And the court of K. B. refused a rule for a new trial. *Ibid.* and (less fully) 7 T. R. 269.

Acc. Dig. 12, 6, 35; *Ibid.* 17, 1, 29, 5; Cod. 7, 52, 4. And see F. N. B. 181, A. F., *Vandebergh* v. *Blake*, Hardres, 194; Sav. 70; *Scott* v. *Nesbit*, 2 Bro. C. c. 641; *Ware* v. *Horwood*, 14 Ves. 28, 31. But see ante, ACTION ON THE CASE, B (f).

101. Assumpsit lies against a sheriff retaining more than his dues. *Longdill* v. *Jones*, 1 Stark. 345. Ellenborough, C. J. 1816.

F. NON ASSUMPSIT.

102. In an action by an indorsee against acceptor, an act of bankruptcy, committed by the payee before indorse-

ment, is a good defence upon the general issue. *Pinkerton* v. *Adams and Milner*, 2 Esp. 511. Kenyon, C. J. 1797.

S. P. admit. *Arden* v. *Watkins*, 3 East, 322, 3.

103. A release may be given in evidence under *non assumpsit*. *Miller* v. *Aris*, 3 Esp. 231. 3. Kenyon, C. J. 1800.

And see *Sullivan* v. *Matthews*, Dougl. 106, 10; Gilb. C. P. 64.

104. But the plaintiff may shew that the release was obtained by fraud. *Miller* v. *Aris*, *ubi supra*.

105. It is no defence that policies of insurance have been deposited with the plaintiff by way of collateral security, upon which arbitrators have awarded a certain sum to be due; but if the amount had been actually paid, it would have been a discharge *pro tanto*. *Scott and others* v. *Lifford*, 1 Campb. 246. Ellenborough, C. J. 1808.

S. C. not S. P. 9 East, 347.

106. In assumpsit upon an express promise to the mother of a bastard child to pay for its maintenance, it is no defence, that the defendant has since discovered that the child is not his. *Shaw* v. *Whiteman*, Peake, 29. Kenyon, C. J. 1791.

107. Payment by *bills* is *primâ facie* an answer to a money demand, without shewing that such bills were discharged. *Hebden* v. *Hartsink*, *et alt.* 4 Esp. 46. Kenyon, C. J. 1801.

108. If, after action brought, the debt be paid without a rule of court, or judge's order, the plaintiff is entitled to a verdict. *Athinson* v. *Thornton*, 1 Campb. 559 n. Ellenborough, C. J. 1808.

109. S. P. *Toms* v. *Powell*, 6 Esp. 50. Heath, J. Kingston, 1806.

S. C. 7 East, 538; 3 Smith, 554.

ATTORNEY.

A. Certificate.

B. Bill of costs.

(a) *In what cases to be delivered.*

(b) *To whom.*

(c) *At what place.*

(d) *At what time.*

(e) *Evidence in support of.*

C. Liability for misconduct.

(a) *Plaintiff's loss, how proved.*

(b) *Defendant, how shewn to be an attorney.*

(c) *Gross negligence, what shall be.*

D. Summary jurisdiction of the court over.

E. How protected.

A. Certificate.

1. If A. and B. carry on business together as attorneys, A. is liable to the penalty for not entering his certificate, though it appear that, by a private arrangement, A. was to derive no benefit from the suit, in respect of which the penalty is claimed. *Edmonson, qui tam.* v. *Davis, one, &c.* 4 Esp. 14. Kenyon, C. J. 1801.

2. *Dubitatur*, whether an attorney is liable to distinct penalties in respect of each step which he takes in a cause without having entered his certificate. *Ibid.*

3. In an action for practising without a certificate, the act charged was the suing out of a serviceable latitat. The plaintiff proved the entry of the præcipe in the filacer's book, and that notice had been given to the defendant to produce the writ of which he proposed to give a copy in evidence. *Held*, that it was incumbent on the plaintiff to produce an office copy of the writ as returned; or to prove that search had been made in the treasury for such return, and that after the return day it was in the hands of the defendant. *Edmonstone* v. *Plaisted, gent.* 4 Esp. 160. Ellenborough, C. J. 1802.

4. Where the act charged is the filing of a declaration, "*in a certain suit depending*," it is sufficient to produce a declaration taken out of the office, indorsed to plead in the hand-writing of the defendant. *Ibid.*

5. *Semble*, that the notice of action against a magistrate must be indorsed by an attorney who has taken out his certificate. *Sabin* v. *De Burgh and others*,

2 Campb. 196. Ellenborough, C. J. 1809.

6. But proof that the attorney had ordered his clerk to take out a certificate, and had given him money for that purpose, is sufficient evidence of qualification. *Ibid.*

B. BILL OF COSTS.

B. (a) *Delivery of.*

7. One attorney may bring an action for business done as agent for another attorney without delivering a bill signed. *Bridges, one, &c.* v. *Francis*, Peake, 1. Kenyon, C. J. 1790.

8. S. P. ruled in *Nelson* v. *Garforth*, 1 Esp. 221. Kenyon, C. J. 1794.

9. S. P. ruled in *Jones, one, &c.* v. *Price*, Peake, 2 n. Lee, C. J. 1748.

And see *Dixon* v. *Plant*, 1 Doug. 199, n.; ex-parte Bearcroft, *ibid*, 200, n; *Groom* v. *Symonds*, Tidd, 586; *Ford* v. *Maxwell*, post. § 12.

10. A bill for business done at the quarter sessions must be signed and delivered. *Donovan* v. *Clarke*, 1 Esp. 137. Kenyon, C. J. 1794.

And the court of K. B. set aside a nominal verdict for the plaintiff. *Ibid.* and 5 T. R. 694.

And see *Ashton* v. *Molineux*, Barnes, 122.

N. But a bill for soliciting an act of parliament cannot be taxed, Wheeler, ex-parte, 3 V. and B. 21.

Qu. As to costs of prosecuting writs of error in D. P. *Ibid.*

11. The plaintiff's attorney cannot proceed with the cause after payment of the debt and part of the costs, for the purpose of recovering the remainder of the costs, to which his right is doubtful. *Charlwood, et alt.* v. *Berridge*, 1 Esp. 345. Eyre, C. J. 1795.

12. One attorney suing another for business done before the admission of the latter, need not deliver a bill. *Ford, gent.* v. *Maxwell, gent.* 1 Esp. 420. Eyre, C. J. 1795.

And the court of C. P. refused a rule to enter a nonsuit. *Ibid.* and 2 H. Bla. 589.

13. Where costs in chancery are directed to be taxed, and infants are parties, the taxation is made as between *party and party*. After the payment, therefore, of such taxed costs, the client is liable for the extra costs. *Ford* v. *Maxwell*, *ibid.*

14. To entitle an attorney to set off his fees, he must deliver a bill signed. *Bulman* v. *Birkett*, 1 Esp. 449. Kenyon, C. J. 1796.

S. P. *Murphy* v. *Cunningham*, 1 Anst. 198.

15. But it is not necessary that a month should intervene between the delivery of the bill and the trial. *Ibid.*

16. Where the demand is merely for filing a warrant of attorney, a bill must be delivered. *Sandom, gent. one, &c.* v. *Bourn*, 4 Campb. 68. Ellenborough, C. J. 1814.

And see *Winter* v. *Payne*, T. R. 645; ex-parte Prickett, 1 N. R. 266.

17. Copy of a bill is evidence without notice to produce the original. *Anderson, administrator*, v. *May*, 3 Esp. 167. Eldon, C. J. 1800.

And the court of C. P. refused a rule for a new trial. 2 Bos. and Pul. 237.

18. An attorney cannot recover the money paid out of pocket, if he has neglected to deliver a bill; even where he has agreed to wave the remainder of his demand. *Miller, one, &c.* v. *Towers*, Peake, 102. Kenyon, C. J. 1790.

19. *Secus*, where the money out of pocket, is money paid to the opposite party by the express direction of the client, has never been carried to the general account, and is sued for separately. *Benton, one, &c.* v. *Garcia*, 3 Esp. 149. Heath, J. 1800, Kingston.

Sed vide *Hill* v. *Humphreys*, 2 Bos. and Pul. 343; *Mowbray* v. *Fleming*, 11 East, 285.

20. But the separation cannot be made at the trial. *Crowder and others* v. *Shee*, 1 Campb. 437. Ellenborough, C. J. 1808.

22. Delivery of the bill at the client's *counting house* is not sufficient. *Hill, one, &c.* v. *Humphreys*, 3 Esp. 254. Kenyon, C. J. 1800.

And the court of C. P. discharged a rule for setting aside nonsuit. 2 Bos. and Pul. 343.

23. It is sufficient to leave the bill at defendant's last *known* place of abode. *Wadeson* v. *Smith*, 1 Stark. 324. Ellenborough, C. J. 1816.

24. An attorney may bring an action for his fees at the expiration of a *lunar* month from the delivery of his bill. *Hurd, gent.* v. *Leach*, 5 Esp. 168. Ellenborough, C. J. 1804.

25. Undertaking to pay what shall appear due, admits the retainer. *Lee, one, &c.* v. *Jones*, 2 Campb. 496. Ellenborough, C. J. 1810.

26. Therefore, in an action on the bill, it is sufficient to produce the judge's order for the taxation, the defendant's undertaking, and the master's allocatur. *Ibid.*

27. Without proving the several items having been done; *Phillips* v. *Roach*, Esp. D. N. P. 10. Hereford Summer Assizes, 1762.

28. Provided a foundation be laid by shewing the existence of the causes and business in respect of which the charges are made, and proving the main articles. Anon, Esp. D. N. P. 10. Smyth B. Stafford, 1763.

And see Tidd, 389.

29. Where two persons who are not partners, are liable for business done on their joint retainer, it is sufficient if the attorney deliver a copy of his bill to the party who has been entrusted with the management of the business. *Finchett, gent.* v. *How and Jarratt*, 2 Campb. 277. Ellenborough, C. J. 1809.

30. In an action against bail for the costs of rendering a tender of their costs, is invalidated by a subsequent refusal by one of the bail. *Peirse* v. *Bowles and another*, 1 Stark. Ellenborough, C. J. 1816.

N. After delivery of a bill to the intestate, it is not necessary to redeliver it to administrator. *Reynolds* v. *Caswell*, 4 Taunt. 193.

31. *Semble*, that separate bills need not be delivered to underwriters who join in the consolidation rule. *Crowder* v. *Shee*, ubi supra.

32. *Semble*, that an attorney may maintain an action against assignees of a bankrupt, upon a bill delivered a month before the commencement of the suit, though not taxed by a master in chancery. *Finchett* v. *How*, *ubi supra*.

33. Bail to the sheriff are *prima-facie* liable to the attorney for the expense of putting in bail above. *Hector* v. *Carpenter*, 1 Stark. 190. Ellenborough, C. J. 1816.

And see *Lyng* v. *Revell*, 5 Wentw. 145.

34. If, after action brought, the debt be paid without the knowledge of plaintiff's attorney, the plaintiff may proceed for the costs. *Toms* v. *Powell*, 6 Esp. 40. Heath, J. Kingston, 1806.

And the court of K. B. refused to grant, on this ground, a rule nisi for a new trial. 7 East, 536; S. C. 3 Smith, 554.

And see *Smith* v. *Brocklesbury*, 1 Anst. 61; *Swain* v. *Senate*, 2 N. R. 99; *Chapman* v. *Haw*, 1 Taunt. 341; *Middleton* v. *Hill*, 1 M. and S. 240; post, E. 3, 4.

35. It is no defence to an action by an attorney for his bill, that he neglected to file a plea of nonjoinder in abatement, when instructed to do so expressly for delay. *Johnson, gent.* v. *Alston*, 1 Campb. 176. Ellenborough, C. J. 1808.

36. Or that the bill was incurred in suing out a commission of bankruptcy, in consequence of a mistaken representation by the plaintiff that it would operate in the Isle of Man. *Pasmore* v. *Birnie*, 2 Starkie, 59. Ellenborough, C. J. 1817.

Et vide, Dig. 17, 1, 29, 4; *Templer* v. *M'Lachlan*, 2 N. R. 136.

C. Liability for misconduct.

C. (a) *Plaintiff's loss, how proved.*

37. Declaration against an attorney for suffering A. to be superseded, averred, that A. was justly indebted to the plaintiff. It was proved that A. was a married woman. The variance was held fatal. *Lee* v. *Ayrton, one, &c.* Peake, 119. Kenyon, C. J. 1792.

38. *Dub.* whether, if the averment had been omitted, the action would have lain. *Ibid.*

N. That it would not, see *Gunter* v. *Clayton*, 2 Lev. 85; *Alexander* v. *Macaulay*, 4 T. R. 611; 2 Saund. 150, n. 1.

And see *Bentley* v. *Donnelly*, 8 T. R. 127.

39. An action for negligence in conducting a suit against excise officers for a seizure, cannot be maintained, if it appear that the seizure was lawful. *Aitcheson and another* v. *Madock, one, &c. and another*, Peake, 162. Kenyon, C. J. 1792.

40. But it will be presumed, that the seizure was unlawful until the contrary is shewn. *Ibid.*

41. Where the statute of limitations is pleaded to such an action, *semble*, that six years are to be computed from the time the plaintiff was damnified, *not from* the committing of the blunder. *Compton* v. *Chandless, one, &c.*, 4 Esp. 18. Kenyon, C. J. 1801.

42. An attorney is not culpable in neglecting to file a plea of nonjoinder in abatement, *expressly for delay*. *Johnson, gent.* v. *Alston*, 1 Camph. 176. Ellenborough, C. J. 1808.

C. (b) *Defendant, how shewn to be an attorney.*

43. A bill for business done in a particular court, is not evidence that the party was an attorney *of that court*. *Green* v. *Jackson*, Peake, 236. Kenyon, C. J. 1794.

And see *Berryman* v. *Wise*, 4 T. R. 366; *Cross* v. *Kaye*, 6 T. R. 663.

44. To prove a party an attorney, the book kept by the master of the king's bench, into which the names of the attornies are copied from the original roll, is evidence. *Rex* v. *Crossley, gent.*, 2 Esp. 526. Kenyon, C. J. 1797.

C. (c) *Gross negligence, what shall be.*

45. Though it is now fully settled by the decision in *Askew* v. *Mackreth*, 1 N. R. 214, and other cases, that the grant, or assignment, of an annuity is void, unless the trusts in the annuity deeds are recited in the memorial, the omission of such a recital, previously to these decisions, is not gross negligence, for which an attorney is answerable to his client. *Baikie* v. *Chandless, gent. one, &c.* 3 Camph. 17. Ellenborough, C. J. 1811.

46. S. P. ruled in *Compton* v. *Chandless, gent.* 3 Camph. 19. Le Blanc, J. 1802.

47. An attorney is not bound to attend the trial of a cause, and is not liable for the loss of a suit occasioned by the absence of a witness, whose attendance he had reason to expect. *Dax* v. *Ward*, 1 Stark. 409. Ellenborough, C. J. 1816.

N. The attorney is not bound to attend at Nisi Prius, though he remain attorney on the record. H. 21, E. 3, fo. 46, pl. 64.

And see 11 E. 4, fo. 2; Manning's Exch Pra. 585, 6.

D. Summary Jurisdiction of the Court over.

48. If, in an action brought to recover the balance of an account, the plaintiff's attorney deliver a particular, setting out the debtor side of the account, but omitting to give the defendant credit for payments which the plaintiff does not mean to dispute at the trial; *semble*, that the court will order the attorney to pay the costs on both sides. *Adlington* v. *Appleton* 2 Camph. 410. Ellenborough, C. J. 1810.

And see 7 Mod. 290, case 286.

E. Privileges.

49. Where a bill filed against an attorney in vacation, is entitled generally of the preceding term, he may plead the statute of limitations, and shew that the six years had elapsed when the bill was actually filed. *Snell* v. *Phillips, one, &c.* Peake, 209. Kenyon, C. J. 1794.

And see Tidd, 376, 7.

50. An attorney acting in the fair discharge of his duty, should not be made a co-defendant in an action of trespass and false imprisonment, brought against his client. *Sedley* v. *Sutherland and others*, 3 Esp. 202. Kenyon, C. J. 1800.

Sed vide *Barker* v. *Braham*, 3 Wils. 368. Recognized in *Carrett* v. *Smallpage*, 9 East, 341.

And see *Trowbridge* v. *Hard*, Latch, 220.

C. (d) *Effect of negligence.*

51. Where the grantee of a void annuity recovers the consideration from his attorney, the latter cannot sue the grantor. *Bardon, gent.* v. *Webb*, 2 Esp. 527. Kenyon, C. J. 1797.

AUCTION.

A. Rights and liability of auctioneer.

(a) *Rights against vendor.*
(b) *Rights against vendee.*
(c) *Liability to vendee.*

B. Rights and duties of vendee.

C. Auction duty.

A. Rights and liability of auctioneer.

A. (a) *Rights against vendor.*

1. An auctioneer cannot claim a percentage which exceeds a fair remuneration for his trouble, except upon the footing of a special agreement. *Maltby, assignee of Durouveray,* v. *Christie,* 1 Esp. 340. Kenyon, C. J. 1795.

2. *Dub.* whether notice of the existence of a custom to pay such per-centage, would be evidence of an agreement. *Ibid.*

3. An action was brought against an auctioneer to recover the deposit upon an alleged defect of title. The auctioneer gave notice to the vendor to come in and defend, which not being done, the former paid the deposit, *interest, duty, and costs,* to the vendee. Held, that in an action for money paid, the auctioneer might recover the interest and duty, but that he could not entitle himself to the *costs,* without declaring specially. *Spurrier* v. *Elderton, one, &c.,* 5 Esp. 1. Ellenborough, C. J. 1803.

And see Dig. 21. 2. 55—*Ibid,* 21. 2. 56. 1.

(b) *Rights of auctioneer against vendee.*

4. Auctioneer may sue the vendee in his own name, though the name of the vendor be declared at the time of sale. *Atkyns and Batten,* v. *Amber,* 2 Esp. 493. Eyre, C. J. 1796.

A. (c) *Liability of auctioneer to vendee.*

5. Where an auctioneer does not disclose the name of his principal *at the time of the sale,* he may be called upon not only to refund the deposit, but to answer any damages which the vendee may have sustained by the non-completion of the contract. *Hanson* v. *Roberdeau,* Peake, 120. Kenyon, C. J. 1792.

And see *Morgan* v. *Corder,* Paley's Prin. and Agent, 250; Dig. 21. 2. 70.

6. An auctioneer is bound to take the same care of goods sent to him for sale, as he would of his own, but he is not liable for unavoidable accidents. *Maltby, assignee of Durouveray,* v. *Christie,* 1 Esp. 340. Kenyon, C. J. 1795.

Acc. *Coggs* v. *Bernard,* 2 Lord Raym. 917. S. C. Holt. 131.

And see Woodlife's case, Moor, 462, pl. 650; Anon. Owen, 51; 1 Vin. Abr. 161, Co. Litt. 189, a. and ibid. n. 6.

7. An auctioneer who sells goods after notice that they do not belong to his employer, is personally liable for the amount. *Hardacre* v. *Stewart,* 5 Esp. 103. Ellenborough, C. J. 1804.

And see *Burrough* v. *Skinner,* 5 Burr. 2639.

B. Rights and duties of vendee.

8. Purchaser of two houses in distinct lots, may refuse to take one house if no title can be made to the other. *Chambers* v. *Griffiths, et alt.* 1 Esp. 150. Kenyon, C. J. 1794.

And see post, Vendor, E.

9. Where the conditions of sale provide, that any mistake in the *particular* shall not vitiate the contract, such stipulation does not extend to a wilful misdescription of the situation of the property, calculated to enhance its apparent value. *Duke of Norfolk* v. *Worthy,* 1 Campb. 340. Ellenborough, C. J. 1808.

10. Conditions of sale, pasted on the auctioneer's box, give sufficient notice to the buyer. *Mesnard* v. *Aldridge,* 3 Esp. 271. Kenyon, C. J. 1801.

And see Dig.

C. Auction duty.

11. A sale of the estate of a bankrupt *by a mortgagee*, before the commissioners, is subject to the auction duty. *Coare* v. *Creed*, 2 Esp. 699. Kenyon, C. J. 1798.

S. P. *Ex parte* Coming, Co. B. L. 139.

BAIL.

A. Bail below.

B. Bail above.

A. Bail below.
(And see Deed, B. (c) 1.)

1. An averment of the issuing of a latitat against "*Francis* J. by the name of John J." is not supported by evidence of a latitat against *John* J., although the bond was signed by the principal "*Francis* J. arrested by the name of *John* J." and the debt and the identity of the party can be proved. *Scandover and others* v. *Warne*, 2 Campb. 270. Ellenborough, C. J. 1809.

And see *Wilks* v. *Lorck*, 2 Taunt. 399; *Shadgett* v. *Clipson*, 8 East, 328.

2. It is irregular to sue in K. B. on a bond for an appearance in the palace court. *Wright* v. *Walmsley*, 2 Campb. 396. Ellenborough, C. J. 1810.

And see *Chesterton* v. *Middlehurst*, 1 Burr. 642; *Walton* v. *Bent*, 3 Burr. 1923; *Morris* v. *Rees*, 2 Bla. 838; S. C. 31 Wils. 348; *Donnaty* v. *Barclay*, 8 T. R. 152; *Barnes* 92, 117.

Sed vide *Newman* v. *Fawcett*, 1 H. Bla. 631; 2 Saund. 61, a.

3. And *semble*, that proceedings will be stayed upon motion. *Ibid.*

4. Or that the irregularity may be specially pleaded. *Ibid.*

N. Qu. if it must not be in *abatement?*

5. But no advantage can be taken of this irregularity upon *non est factum. Ibid.*

6. Nil debet is a bad plea in an action on the bail bond. *Rawlins and another, sheriff of Middlesex*, v. *Danvas*, 5 Esp. 38. Ellenborough, C. J. 1805.

And see 1 Saund. 187; a.; *Smith* v. *Whitbread*, 2 Stra. 780; S. C. 2 Lord Raym. 1503; *Wilson* v. *Hardr.* 332; *Mills* v. *Bond*, Fort. 363; *Maighen* v. *Maighen*, ibid, 367; Anon. 2 Wils. 10; *Hart* v. *Weston*, 5 Burr. 2586; S. C. 2 Bla. 683.

7. But if the plaintiff, instead of demurring, join issue, and proceed to trial, the defendant may set up any defence he thinks proper. *Ibid.*

8. Bail to sheriff are *primâ facie liable* to the attorney for cost, of putting in bail above. *Hector* v. *Carpenter*, 1 Stark. 190. Ellenborough, C. J. 1816.

B. Bail above.

9. Bail put in without the privity of the defendant, by the sheriff's officer, who had discharged him without taking a bail bond, may seize and surrender the defendant. *Rex* v. *Butcher and others*, Peake, 169. Kenyon, C. J. 1793.

Acc. *Pyewell* v. *Stow*, 3 Taunt. 425.

And see *Winstanley* v. *Head*, 4 Taunt. 192.

BAILMENT.

(And see Trespass, B. 14, 5.)

A. Liability of borrower for hire.

B. Liability of keeper for hire.

C. Liability of undertaker of work.
(And see Carrier.)

A. Liability of borrower for hire.

1. *Semble*, that if a traveller be permitted to go into a post-chaise, and to put on his luggage, he may insist on having the journey performed without tendering the fare. *Massiter* v. *Cooper*, 4 Esp. 260. Ellenborough, C. J. 1803.

5. But, at all events, if he tender a sum which the postmaster has stated to be the proper fare, it is a breach of contract not to perform the journey. *Ibid.*

3. Where a hired horse is taken ill, and the hirer, without calling in a farrier, administers improper medicines, which cause the animal's death, the owner is

entitled to recover the value. *Dean* v. *Keats*, 3 Campb. 4. Ellenborough, C. J. 1811.

4. The hirer of a horse is not responsible for an injury received during the term, without proof of positive negligence. *Cooper* v. *Barton*, 3 Campb. 5, n. Le Blanc, J. Lancaster, 1810.

And see Doct. and Stud. dial. 2, cap. 38. *Longman* v. *Galini*, Abb. 270.

B. Liability of keeper for hire.
(And see Auction, 6.)

5. A warehouseman is not answerable for destruction by rats, reasonable care having been taken to prevent such an accident. *Cailiff and another* v. *Danvers*, Peake, 114. Kenyon, C. J. 1792.

So a hoyman, *Dale* v. *Hall*. 1 Wils. 281. Sed vide Abb. 255.

6. A farmer taking in horses to agist, is liable only for negligence. *Broadwater* v. *Blot*, Holt. 547. Gibbs, C. J. 1817.

7. Bailee of goods to be kept for hire, is not answerable for a theft committed by his servants. *Finucane* v. *Small*, 1 Esp. 315. Kenyon, C. J. 1795.

Acc. *Moore* v. *Mourgue*, Cowp. 480; 29 Ass. pl. 28. Sed vide dict. *per Wilson, J. in Shiells* v. *Blackburn*, 1 H. Bla. 161.

8. The responsibility of a warehouseman commences from the moment that his tackle is applied to the goods for the purpose of lifting them into the warehouse. *Thomas et alt.* v. *Day*, 4 Esp. 262. Ellenborough, C. J. 1803.

And see *Goff* v. *Clinkard*, 1 Wils. 282.

9. And it is no excuse for an injury done in raising the goods from the cart, that the owner's agent (the carman,) refused to secure them in the manner which the warehouseman pointed out. *Ibid.*

10. Where it is proved to be the custom of wharfingers, when goods are sent to be forwarded coastwise, to deliver them to the mates of the coasters, and not to ship the goods themselves, or take any charge for shipping; the responsibility of the wharfinger ceases with the delivery to the mate, though the goods are lost before they are carried off the wharf. *Cobban and another* v. *Downe*, 5 Esp. 41. Ellenborough, C. J. 1803.

11. A delivery at a wharf to an unknown person found there, is not sufficient to charge the wharfinger or the vendee. *Buckman* v. *Levi*, 3 Campb. 414. Ellenborough, C J. 1813.

12. A public company who insist upon their own servants being employed in the unloading of goods, are responsible for the negligence of such servants, though they derive no benefit from the labour. *Gibson* v. *Inglis, Esq.*, 4 Campb. 72. Ellenborough, C. J. 1814.

13. The proprietor of a dry-dock, into which a vessel is put for repair, is answerable for an injury arising in the day-time from the bursting in of the dock-gates, though the gates were strong enough to have resisted the ordinary pressure of the water; if the accident might have been prevented, had a sufficient number of men been on the spot. *Leck and another* v. *Maestaer*, 1 Campb. 138. Ellenborough, C. J. 1807.

And see *Amies* v. *Stevens*, 1 Stra. 128; Bull. N. P. 69.

BANKRUPT.

A. Trading.

B. Act of bankruptcy.

(a) *Departing the realm.*
(b) *Beginning to keep house.*
(c) *Absenting himself.*
(d) *Departing from dwelling-house.*
(e) *Fraudulent conveyance.*
(f) *Lying in prison.*
(g) *Whether an act of bankruptcy may be purged.*
(h) *Concerted.*

C. Petitioning creditor.

D. Commission.

(a) *Under what circumstances valid.*
(b) *By whom impeachable.*
(c) *How contested.*

E. Operation of assignment upon property in the hands of bankrupt.

(a) *As vendee.*

(b) *As indorsee.*

(c) *As reputed owner.*

(d) *As trustee.*

(e) *Where no beneficial interest.*

F. Assignees.

(a) *Authority of assignees.*

(b) *Actions by assignees.*

(c) *Liability of assignees.*

G. Transactions with bankrupt, where protected.

(a) *Payments to bankrupt.*

(b) *Payments by bankrupt.*

(c) *Transfers from bankrupt.*

H. Rights and duties of bankrupt.

(a) *Allowance.*

(b) *Interest in after-acquired property.*

(c) *Protection from arrest.*

(d) *Liability upon new promise.*

I. Certificate.

(a) *To what demands a bar.*

(b) *How pleaded.*

(c) *How avoided.*

A. Trading.

1. A schoolmaster who buys books and shoes, and retails them to his scholars at an advanced price, is not a trader. *Valentine* v. *Vaughan*, Peake, 76. Kenyon, C. J. 1791.

S. P. *obiter;* Skinner 292, and 3 Mod. 330.

And see *Doe* v. *Keeling*, 1 M. and S. 95.

2. A person who keeps and kills more pigs than are required for his own consumption, with a view of profit from a re-sale, is a trader. *Newland* v. *Bell*, Holt. 221. Gibbs, C. J. 1816.

See *Stewart* v. *Ball*, 2 N. R. 79.

3. And one instance of buying and selling is sufficient. *Ibid.*

And see *Holroyd* v. *Gwynne*, 2 Taunt. 176.

4. A clerk in the custom-house, employed by merchants to receive money on debentures, with which he discounts bills on his own account, is not a *scrivener* within the meaning of the bankrupt laws. *Hamson, assignee of Pingo*, v. *Harrison*, 2 Esp. 555. Kenyon, C. J. 1797.

5. Nor an attorney receiving and placing out the money of his client in the usual course of business. *Ralph Adams and others* v. *Malkin and another*, 3 Campb. 534. Gibbs, C. J. 1814.

S. C. published at length in a separate pamphlet by Hurd.

6. An attorney who is a depositary of money, to be laid out in securities at his own discretion, and has a compensation distinct from his fees for drawing conveyances, is a scrivener. *Hutchinson and another, assignees of Wardell, a bankrupt*, v. *Gascoigne, Esq.* Holt, 507. Wood, Baron, York Lent assizes, 57 Geo. 3. 1817.

7. *Secus*, where the attorney makes his charges in respect of the deeds, securities, &c. and not as commission on the moneys in his hands. *Hurd* v. *Brydges and another*, Holt. 654. Dallas, J. 1817.

8. An executor, carrying on trade for the benefit of testator's children, may be a bankrupt. *Viner, administratrix*, v. *Cadell*, 3 Esp. 88. Eldon, C. J. 1800.

Acc. *Hankey* v. *Towgood*, Co. B. L. 75. And see *ex parte* Garland, 10 Ves. 110.

9. The mere circumstance of a person's not having any transactions in business during a particular period, will not exempt him from the operation of the bankrupt laws, where, by soliciting orders, &c. he evinces his intention of continuing to trade. *Wharam* v. *Routledge*, 5 Esp. 235. Ellenborough, C. J. 1805.

10. And where a fisherman has occasionally bought and sold fish, as incidental to his business, it will be presumed, whilst he remains a fisherman, that he carries on business in the same way. *Heanny and another, assignees of Marchand*, v. *Birch and another, Sheriffs.*

of London, 3 Campb. 233. Ellenborough, C. J. 1812.

11. A person who buys timber, which he works into houses which he builds and sells, is not a trader. *Clark* v. *Wisdom*, 5 Esp. 147. Ellenborough, C. J. 1804.

12. Nor a person who builds a theatre to be held in shares, for which he is to be paid according to measure and value, he being himself a share-holder. *Williams* v. *Stevens*, 2 Campb. 300. Ellenborough, C. J. 1809.

13. Nor one who erects public baths, upon land granted for this purpose, to himself and another, as joint tenants. *Ibid.*

And see *Sutton* v. *Weeley*, 7 East, 442; S. C. 3 Smith, 445; *Holroyd* v. *Gwynne*, 2 Taunt. 176.

B. Act of bankruptcy.

B. (a) *Departing the realm.*

14. If a subject, or denizen, domiciled in Ireland, leave his family there, and come to England to settle his affairs, and return to Ireland abruptly to avoid an arrest, it is an act of bankruptcy. *Williams* v. *Nunn and another*, 1 Campb. 152, 80 c. Chambre, J. 1807.

And the court of C. P. discharged a rule for setting aside verdict. 1 Taunt. 270.

N. It is there stated that the bankrupt's family resided *in England*, which circumstance was particularly adverted to by the court. *Ibid.* 277.

15. A trader going to France, to look after his concerns there, does not commit an act of bankruptcy, though his creditors be thereby delayed. *Warner and another* v. *Barber*, Holt. 175. Gibbs, C. J. 1816.

16. *Secus*, if the fear of arrest concur with his other motive. *Ibid.*

17. Where the delaying of creditors is the *necessary* consequence of the trader's absenting himself, it amounts to an act of bankruptcy. *Ramsbottom and others* v. *Lewis and others*, 1 Campb. 279. Ellenborough, C. J. 1808.

And see Woodier's case, Bull. N. P. 39, *post*, B. (d) 28.

B. (b) *Beginning to keep house.*

18. A denial to several persons, whom the witness believes, from their frequent calling, to be creditors, is evidence to go to the jury. *Jameson, assignee of White*, v. *Eamer et alt. Sheriffs of London*, 1 Esp. 381. Kenyon, C. J. 1795.

19. A denial to a creditor who calls for payment, but does not ask to *see* the debtor, is not an act of bankruptcy. *Dudley* v. *Vaughan*, 1 Campb. 271. Ellenborough, C. J. 1808.

20. Nor a refusal to see a creditor merely on the ground of his calling at the trader's dinner hour. *Smith and another assignee of Williams* v. *Currie*, 3 Campb. 349. Ellenborough, C. J. 1813.

Acc. Bull. N. P. 39.

N. But the intention of the creditor in calling is immaterial; White *ex parte* 3 V. and B. 129. Rose.

21. A trader withdraws from his counting-house to his parlour for the purpose of avoiding the importunities of his creditors. This is an act of bankruptcy. *Dudley* v. *Vaughan, ubi supra.*

And see *Bayley* v. *Schofield*, 1 M. and S. 338; *Bignold* v. *Waterhouse*, 1 M. and S. 255.

22. A direction to a servant to deny the trader to any one who should come whilst he was at dinner, or engaged in business, is not an act of bankruptcy. *Shew and another* v. *Thomson*, Holt, 159. Gibbs, C. J. 1816.

B. (c) *Absenting himself.*

23. If a trader, on absenting himself from his house, state, that writs are out against him, it is not necessary to shew that any writ had in fact issued. *Wilson et alt. assignees of Warner* v. *Norman*, 1 Esp. 334. Kenyon, C. J. 1795.

S. C. Mont. B. L. app. 162.

And see *Robertson v. Liddell*, 9 East, 487; S. C. 3 Smith, 347, 50; *Holroyd* v. *Gwynne*, 2 Taunt. 176.

24. A trader, on being applied to for payment, leaves his house under pretence of getting money, but goes to a billiard table, and remains there the whole evening. This is an act of bank-

ruptcy. *Bigg, assignee of Fisher,* v. *Spooner,* 2 Esp. 651. Kenyon, C. J. 1798.

25. A. in London, is in partnership with B. in Manchester. A. goes to Manchester; and after remaining there two days, secretly leaves the Manchester counting-house with B. This is an act of bankruptcy by both. *W. Spencer* v. *Billing,* 3 Campb. 312. Ellenborough, C. J. 1812.

And see *Bayly* v. *Schofield,* 1 M. and S. 338.

26. A trader *remaining* abroad, with intent to delay his creditors, commits an act of bankruptcy.

And the court of K. B. refused a rule to set aside a verdict for the plaintiffs. *Ibid.*

B. (d) *Departing from dwelling-house.*

27. A departure with the *intent* to delay creditors, is a sufficient act of bankruptcy, though no creditor be *actually* delayed. *Hammond et alt. assignees of Gadsden,* v. *Hicks,* 5 Esp. 139. Mansfield, C. J. 1804.

And the court of C. P. discharged a rule for setting aside verdict. *Ibid.*

28. So if a trader goes away without leaving any direction for carrying on his business. *Holroyd and others, assignees of Hale,* v. *Whitehead and others,* 3 Campb. 530. Gibbs, C. J. 1814.

S. C. recognized in *Robertson* v. *Liddell,* 9 East, 487, 494, where all the cases are collected. S. C. 3 Smith, 347.

And see *Williams* v. *Nunn,* 1 Taunt. 270; *Bayly* v. *Schofield,* 1 M. and S. 338.

B. (e) *Fraudulent conveyance.*

29. A fraudulent conveyance cannot be read to support the commission, if unstamped. *Whitwell and others, assignees, &c.* v. *Dimsdale and others,* Peake, 168. Kenyon, C. J. 1792.

30. A conveyance by deed from an insolvent trader to his child, though void, yet being also fraudulent, is an act of bankruptcy. *Whitwell and others, assignees of Stevens and Hattersley,* v. *Thompson,* 1 Esp. 68. Kenyon, C. J. 1793.

31. *Secus* of an *agreement* to sell, not under seal. *Ibid.*

32. A. and B. are partners and insolvent. An assignment to B. from A. in trust for the wife of B., who is the daughter of A., is no act of bankruptcy *by* B., though a party to the deed. *Ibid.*

33. An agreement whereby an insolvent undertakes to pay a composition by instalments, and authorizes the creditors in case of default to take possession of all his goods, is not an act of bankruptcy. *Jolly et alt. assignees of Norton,* v. *Walle,* 3 Esp. 228. Kenyon, C. J. 1800.

34. An assignment by deed of all the effects for the benefit of creditors with a proviso to be void if all the creditors do not execute, but that in the mean time the acts of the trusteer shall be good, is an act of bankruptcy. *Bach and another, assignees of Burrows and Winn, bankrupts,* v. *Cooch,* 4 Campb. 232. Gibbs, C. J. 1815.

35. A. assigns all his stock by a deed, to which B. is a party. B. cannot sue out a commission upon this act of bankruptcy. *Jackson and others, assignees of Robinson,* v. *Irwin and others,* 2 Campb. 49. Ellenborough, C. J. 1809.

36. So where A., though not a party to the deed, approved of acts done under it. *Back and another, assignees of Burrows and Winn, bankrupts,* v. *Gooch,* 4 Campb. 232. Holt, 13. Gibbs, C. J. 1815.

37. S. P. *Hicks and another, assignees of Penford,* v. *Burfelt,* 4 Campb. 235. n. Chambre, J. Winchester, 1812.

And see *Bamford* v. *Baron,* 2 T. R. 594. n.

38. But he may act as an assignee under a commission taken out upon it by another creditor. *Jackson* v. *Irwin,* 2 Campb. 49.

And see *Tappendal* v. *Burges,* 4 East, 430, 5, 6; *Dutton* v. *Morrison,* 17 Ves. 193.

B. (f) *Lying in prison.*

39. A commission issued before the two months have elapsed, is not rendered valid by the party's continuing in prison during the remainder of that

period. *Glassington, assignee of Dickie,* v. *Rawlins and others,* 4 Esp. 221. Lawrence, J. 1803.

S. P. *Gordon* v. *Wilkinson,* 8 T. R. 507.

Sed vide *Hope* v. *Gill,* Beawes, L. M. 498; *Hill* v. *Shish,* 2 Show. 512, 9; Wydown's case, 14 Ves. 80, 3.

40. But a commission issued fifty-six days inclusively after the arrest is good. *Ibid.*

Upon this ground the court of K. B. granted a new trial, 3 East, 407.

And see TIME, 2.

N. There is a mistake of dates in the Nisi Prius Report; as the commission must have issued on the *ninth* instead of the *fifth.*

41. A trader is arrested on the *fourth,* and is allowed to be at large till the *eighth,* when he returns into custody. On the *tenth* he is removed by *habeas* into K. B., and remains there two months. The bankruptcy has relation to the *eighth. John Barnard the younger,* v. *Palmer and another, assignees of John Lochart Barnard,* 1 Campb. 509. Ellenborough, C. J. 1808.

And see *Coles* v. *Wright,* 4 Taunt. 198.

42. But if, after an arrest, he is too ill to be immediately removed, and he remains some days in his house, and is then carried to prison, the relation is to the first arrest. *Stevens* v. *Jackson and another,* 4 Campb. 164. Gibbs, C. J. 1815.

B. (g) *Whether purged.*

43. A denial to a creditor is not purged by his being admitted in consequence of his importunity. *Wood et alt. assignees of Pearce,* v. *Thwaites,* 3 Esp. 245. Le Blanc, J. 1800.

And see *Hopkins* v. *Ellis,* 1 Salk. 110; *Colkett* v. *Freeman,* 2 T. R. 94.

B. (h) *Concerted.*

44. A concerted denial will not support a commission. *Stewart et alt. assignees,* v. *Richman,* 1 Esp. 108. Kenyon, C. J. 1794.

S. P. Field and Bellamy, Bull. N. P. 39; S. P. *Cawley* v. *Hopkins,* Co. B. L. 84, 95; S. P. dub. *Hooper* v. *Smith,* 1 Bla. 441; S. P. *ex parte* Bourne, 16 Ves. 145; S. P. cont. *Branley* v. *Mundee,* Bull. N. P. 39. And see *ex parte* Edmonson, 7 Ves. 303.

45. *Secus* where the creditors are not parties to the contrivance; though they have expressed a wish that a commission should issue. *Roberts and others, assignees,* v. *Teasdale,* Peake, 27. Kenyon, C. J. 1790.

And the court of K. B. set aside a verdict found for the defendant contrary to the direction of the C. J. *Ibid.*

S. P. *Cawley* v. *Hopkins,* Co. B. L. 84, 95; *ex parte,* Bourne, 16 Ves. 145.

46. But a denial concerted with the trader's attorney, who is also attorney to the creditor, and as such takes him to the trader's house, will not support a commission, although the creditor himself be not privy to the arrangement. *Prosser* v. *Smith,* Holt, 442. Burrough, J. 1816.

47. Nor an assignment of all the trader's effects to his foreman, concerted with such attorney. *Ibid.*

C. PETITIONING CREDITOR.

48. It was *ruled,* that a sale of goods upon an *unexpired* credit, constituted a sufficient debt to support a commission under 5 Geo. 2. cap. 30. sect. 22. *Henbest and others, assignees, &c.* v. *Brown,* Peake, 54. Kenyon, C. J. 1791.

49. But this decision has been overturned. *Hoskins, assignee of Deyton,* v. *Duperoy,* 6 Esp. 55. Ellenborough, C. J. 1806.

S. C. after a second trial, 9 East, 498, 500.

And see *Parslow* v. *Dearlove,* 4 East, 438; S. C. 1 Smith, 281; *Surratt* v. *Austin,* 4 Taunt. 200; White, *ex parte,* 3 V. and B. 130.

50. A factor selling goods to a trader in his own name, though not at his own risk, is a good petitioning creditor.

51. *Secus* after the principal has interfered. *Ibid.*

52. And an admission made by such a creditor of the nature of the claim upon which he has in fact sued out a commission, may be given in evidence for the purpose of invalidating the commission in a collateral action. *Young*

and Barley v. *Smith and Phillips, Sheriffs of London*, 6 Esp. 121. Mansfield, C. J. 1806.

53. But *semble*, that upon a sale of goods *for present bill*, the jury may, in some cases, presume that a bill has in fact been given. *Hoskins* v. *Duperoy*, *ubi supra*.

54. In an action for a false return to a *fi. fa.* where the defence rests on the validity of a commission, and the assignees are in substance to defendants, a declaration by one of them who was the petitioning creditor, made subsequently to the commission, that the bankrupt did not owe him 100*l*., is evidence for the plaintiff. *Dowden* v. *Fowle, esq.*, 4 Campb. 38. Dampier, J. 1814.

55. A debt must have accrued to the petitioning creditor before the party ceased to be a trader. *Dawe and others* v. *Holdsworth and others*, Peake, 64. Kenyon, C. J. 1791.

S. P. *Meggott* v. *Mills*, 12 Mod. 157; S. C. 1 Lord Raym. 286, 7; S. C. anon. Comb. 463.

56. But if the debt was *contracted* whilst the bankrupt was in trade, it is sufficient, although it have since merged in a higher security. *Ibid.*

S. P. *Ambrose* v. *Clendon*, Cas. temp. Hardw. 267, 8; S. C. 2 Stra. 1042.

57. But where the bankrupt contracts a further debt after he leaves off trade, and pays money without any direction as to its application, the payment shall be set against the old debt. *Ibid.*

S. P. *Meggot* v. *Mills*, 1 Lord Raym. 286, 7; Anon. but S. C. and S. P. Comb. 463.

58. An acknowledgment made by the bankrupt, *at any time before the suing out of the commission*, is sufficient evidence of the petitioning creditor's debt. *Dowton, et alt.* v. *Cross, esq. Sheriff of Bedfordshire*, 1 Esp. 168. Kenyon, C. J. 1794.

And see *Brett* v. *Levett*, 13 East, 213, 214; *Chapman* v. *Gardner*, 2 H. Bla. 279. post. 68, 69, 78, 79.

59. Payment of money to petitioning creditor, after the suing out of a commission, renders the commission *supersedeable*, under 5 Geo. 2. cap. 30. sect. 24. but not *ipso facto* void. *Garratt, et alt. assignees of Sadler* v. *Sir Theophilus Biddulph*, 4 Esp. 104. Le Blanc, J. 1802.

60. *Semble*, that a warrant of attorney is *debitum in præsenti*, sufficient to support a commission, though it appear by the defeazance to be given merely as a security against the running acceptances of the conusor. *Miles and another* v. *Rawlyns and another, Sheriff of Middlesex*, 4 Esp. 194. Ellenborough, C. J. 1802.

61. A party who has received a dividend under a composition deed, executed after an act of bankruptcy, of which he was ignorant, is a good petitioning creditor. *Doe and Pitcher* v. *Anderson*, 1 Stark. 262. Ellenborough, C. J. 1816.

And the court refused a rule to set aside nonsuit. *Ibid.*

62. *Secus*, If the assignment be the act of bankruptcy relied on. *Ibid.*

63. A. B. and C. cannot be petitioning creditors, in respect of a bill drawn by them, and accepted by the bankrupt, if it appears that A. engaged to provide for the acceptances when they should become due, although such engagement were made in fraud of his partner. *Richmond* v. *Heapy and another*, 1 Stark. 102. Ellenborough, C. J. 1816.

64. A debt owing to the creditor jointly with another person, who does not expressly concur in the petition, will not support a commission. *Brickland (or Buckland) and others, assignees of Mason*, v. *Newsome, late Sheriff of Surrey*, 1 Campb. 474. Ellenborough, C. J. Guildford, 1808.

And the court of C. P. set aside a nominal verdict for the plaintiff. *Ibid.* and one Taunt. 477.

65. A factor who sells goods, without naming his principal, is a good petitioning creditor, inasmuch as he might have sued the vendee. *Sadler, assignee of Knight*, v. *Leigh and another*, 4 Campb. 195. Ellenborough, C. J. 1815.

And see Agent, C. (a); F.

66. But as soon as the principal interposes, the right of the factor ceases. *Ibid.*

But see Agent, F.

67. A person who sells goods, to be paid for by a bill at four months, cannot sue out a commission of bankrupt until such bill has been given, or the four months are fully expired. *Cothay and*

others, assignees of Wilson, v. *Murray*, 1 Camp. 335. Ellenborough, C. J. 1808.

68. The petitioning creditor's debt is sufficiently proved by entries in the bankrupt's books, posted by himself, before the act of bankruptcy. *Watts and others, assignees, &c.* v. *Thorpe*, 1 Camp. 376. Ellenborough, C. J. 1808.

69. Notwithstanding the 46 Geo. 3. cap. 135, sect. 5, it is necessary that the petitioning creditor's debt should have existed at the period of the act of bankruptcy; and it is not sufficient that it accrued previously to the issuing of the commission. *Elias Moss* v. *Smith, esq. and another, Sheriff of Middlesex*, 1 Campb. 489. Ellenborough, C. J. 1808.

And the court of K. B. refused a rule for a new trial. *Ibid.*

And see Wydown's case, 14 Ves. 80, 3. *Beardmore* v. *Shaw*, 1 N. R. 263.

But it is sufficient that such debt vests in the petitioning creditor before the commission is sued out. *Bingley* v. *Maddison*, Co. B. L. 24. B. R. M. 1783. ante, 58, post. 78, 79.

70. Therefore where the debt is a bill drawn by the bankrupt in favour of A., and indorsed to the petitioning creditor, it must be shewn to have been so indorsed before the suing out of the commission. *Rose and another, assignees of Clausey, a bankrupt*, v. *Rowcroft*, 4 Campb. 245. Gibbs, C. J. 1815.

71. An entry in a trader's book, made some months *before* an act of bankruptcy, is *primâ facie* evidence of a debt, subsisting *at the time* of the bankruptcy. *Jackson and others, assignees of Robinson*, v. *Irwin and others*, 2 Campb. 49. Ellenborough, C. J. 1809.

Acc. *Ewer* v. *Preston*, Cases temp. Hardw. 378.

And see Evidence, I. (b)

72. By 5 Geo. 2. cap. 30, s. 25, the petitioning creditor is made solely liable to the payment of the expenses incurred, in suing out and prosecuting the commission, until assignees are chosen. Where, therefore, the petitioning creditor is appointed co-assignee, an action for these expenses will not lie against all the assignees jointly. *Finchett, gent. one, &c.* v. *How and Jarratt*, 2 Campb. 275. Ellenborough, C. J. 1809.

73. The petitioning creditor is liable for the messenger's charges, and not the solicitor who immediately employs him. *Hart* v. *White*, Holt, 376. Gibbs, C. J. 1816.

And see *Hartup* v. *Jukes*, 2 M. and S. 438.

74. Where, in an action by assignees, the defendant gives no notice under 49 Geo. 3. cap. 121, s. 10, of his intention to dispute the petitioning creditor's debt, the debt is sufficiently proved by the deposition of the petitioning creditor himself, appearing on the face of the proceedings; though, if such notice had been given, he would not have been a competent witness to support the commission *vivâ voce*. *Bisse and others, assignees of Stokes*, v. *Randall*, 2 Campb. 493. Lawrence, J. Monmouth, 1810.

75. 5 Geo. 2. c. 30. s. 45. as to taxation, by a Master in Chancery, applies only to the protection of the bankrupt's estate, and not to the attorney's right against his employers. *Tarn, Gent.* v. *Heys*, 1 Stark. 278. Gibbs, C. J. 1816.

76. Costs of messenger's journey to the Isle of Man, held not recoverable against petitioning creditor without a special contract. *Billings* v. *Waters*, 1 Stark, 363. Ellenborough, C. J. 1816.

77. A promissory note, bearing date before the bankruptcy, is *primâ facie* evidence of a debt precedent to bankruptcy. *Taylor* v. *Kinlock*, 1 Stark. 177. Ellenborough, C. J. 1816.

78. But no letter or declaration of the bankrupt, after the bankruptcy, is admissible, in confirmation of the date. *Ibid*, ante, 58, 68, 69.

79. But a deposition stating the debt to be due before and at the time of the issuing of the commission is sufficient. *Clark and others, assignees of Beverley*, v. *Askew*, 1 Stark. 458. n. *Bayley*, J. Durham, 1816.

And the court of K. B. discharged a rule for setting aside nonsuit. *Ibid.*

80. Petitioning creditor is liable to the messenger for necessary expenses only, except by special contract. *Billings* v. *Waters*, 1 Stark. 363. Ellenborough, C. J. 1816.

D. Commission.

D. (a) *Under what circumstances valid.*

81. A commission may be supported on an act of bankruptcy, intelligence of which could not have reached London on the day the commission issued. *Hopper* v. *Richmond*, 1 Stark. 507. Ellenborough, C. J. 1816.

82. An antecedent act of bankruptcy will not defeat a commission, without proof of a subsisting debt, capable of supporting a commission. *Parker* v. *Manning*, 2 Esp. 598, n. Kenyon, C. J. 1798.

83. S. P. ruled in *Miles and another* v. *Rawlyns and another, Sheriff of Middlesex*, 4 Esp. 194. Ellenborough, C. J. 1802.

And see *Donovan* v. *Duff*, 9 East, 21.

84. And it was doubted, whether even this double proof ought to be considered sufficient, without shewing a prior commission actually sued out. *Ibid.*

Sed vide the opinion of Eldon, C. in *Rex* v. *Bullock*, 1 Taunt. 72, 88, and 14 Ves. 452, 67. *Beardmore* v. *Shaw*, 1 N. R. 263.

85. Act of bankruptcy at Doncaster, 21st July. Commission dated 22d July. And held, that where the act is in fact prior to the commission, the time in which the news of it would reach London need not be inquired into. *Hopper* v. *Richmond*, 1 Stark. 507. Ellenborough, C. J. 1816.

D. (b) *By whom it may be impeached.*

86. Proving under the commission, does not estop a creditor from impeaching the commission in an action brought against him by the assignees. *Stewart et al. assignees*, v. *Richman*, 1 Esp. 108. Kenyon, C. J. 1794.

87. S. P. Cont. per Lord Mansfield in *Walker* v. *Burnell*, Dougl. 305 (319) and in *Collins* v. *Forbes*, 3 T. R. 322; S. P. acc. *Hope* v. *Fletcher*; Selw. 238.

Nor is it even *primâ facie* evidence; *Rankin* v. *Horner*, 16 East, 191.

88. Proof of an antecedent act of bankruptcy, and of a debt upon which a commission might have issued, was *ruled* to be sufficient to support an ejectment *on the demise of the bankrupt* against the assignees. *Doe d. Hunter, et alt.* v *Boulcott et alt.* 2 Esp, 595. Eyre, C. J. 1798.

89. But it has since been determined, that neither the bankrupt, nor any one claiming under him, can set up a prior act of bankruptcy. *Mercer* v. *Wise et alt.* 3 Esp. 219. Kenyon, C. J. Maidstone, 1800.

Acc. *Donovan* v. *Duff*, 9 East, 21, 2. *Rex* v. *Bullock*, 1 Taunt. 80, 6, 94.

90. A person declared a bankrupt does not preclude himself from contesting the legality of the commission, by surrendering under it. *Ibid.*

Acc. *ex-parte* Jones, 11 Ves. 409.

91. Nor by the formal words of a petition for enlarging the time for his surrender, stating that he has been *duly* declared a bankrupt. *Ibid.*

92. *Secus*, where he obtains his discharge out of custody in an action by a judge's order, on the ground of his bankruptcy. *Goldie* v. *Gunston and others*, 4 Campb. 381. Ellenborough, C. J. 1816.

93. *Semble*, that on an indictment for perjury by a bankrupt, in passing his last examination, it is necessary to go into strict proof of the bankruptcy. *Rex* v. *Pynshon*, 3 Campb. 96. Ellenborough, C. J. 1811.

D. (c) *How contested.*

94. Evidence may be given to defeat the certificate, though it may indirectly have the effect of impeaching the commission. *Bateson* v. *Hartsink, et alt.* 4 Esp. 43. Kenyon, C. J. 1801.

95. Defendant pleaded to an action at the suit of assignees, before 49 Geo. 3. cap. 121, sect. 10. *Held*, that the defendant not having applied for leave to withdraw his plea, and plead *de novo*, could not compel the plaintiffs to prove the trading, &c. *Wilcock, assignee of Westmacott*, v. *Smith*, 2 Campb. 184. Ellenborough, C. J. 1809.

96. S. P. ruled in *Clarkson* v. *Dadds*, 2 Campb. 184, n. Mansfield, C. J. 1809.

97. The statute extends to cases where servants of the assignees are joined with them in the action. *Gilman* v. *Cousins and three others*, 2 Stark, 182. Bailey, J. 1817.

98. The notice of disputing the validity of the commission, is not to be considered as part of the defendant's case, but may be proved as soon as the assignees attempt to make out a *primâ facie* case by producing the commission. *De Charme and Waine, assignee and assignees,* v. *Lane,* 2 Campb. 324. Ellenborough, C. J. 1809.

99. A defendant who has pleaded without notice to dispute, cannot, even before the time for pleading has expired, redeliver his plea with notice. He must move to withdraw his plea, and plead *de novo. Poole, assignee of Lukin,* v. *Bell and another,* 1 Stark. 328. Ellenborough, C. J. 1816.

100. Though the statute requires the notice by a *defendant* to be given "*at or before* the time of his pleading to the action," yet where the defendant withdraws his plea, and pleads *de novo,* notice given with the second plea will be sufficient. *Ibid.*

101. Notice by a plaintiff to dispute bankruptcy, served at the time when the issue is delivered with notice of trial, is too late. *Richmond* v. *Heapy and another,* 4 Campb. 207. Ellenborough, C. J. 1815.

And see Manning's Exchequer Prac. 272.

102. Where no such notice has been given, the bankruptcy is sufficiently proved by putting in the proceedings under the commission, and shewing that they came out of the hands of the solicitor; or where the solicitor has been changed, by proving the signature of one of the commissioners. *Collinson and another, assignees of Newman* v. *Hillear,* 3 Campb. 30. Ellenborough, C. J. 1811.

103. But the court is not concluded from saying that the proceedings do not disclose a sufficient act of bankruptcy. *Brown and another, assignees of Riorden* v. *Forrestall and another,* Holt, 190. Gibbs, C. J. 1816.

104. In an action of trespass, brought by the bankrupt against his assignees for the purpose of trying the validity of the commission, this notice is necessary, although the defendants are not described as assignees on the record. *Simmonds* v. *Knight and another,* 3 Campb. 251. Ellenborough, C. J. 1812.

105. And if the notice refers only to the act of bankruptcy, and depositions on the file of the proceedings are read to prove the trading and petitioning creditor's debt, the whole of the proceedings are not to be considered in evidence. *Bluck* v. *Thorne and another,* 4 Campb. 191. Ellenborough, C. J. 1815.

106. To entitle the plaintiff to inspect other depositions, he must call for them as part of his case. *Ibid.*

E. Operation of the Assignment upon Property in the Hands of the Bankrupt.

E. (a) *As vendee.*

107. If A. deliver goods to B. upon a contract of sale, the property is changed by the delivery, though the goods were obtained by B. with intent to defraud A.; therefore the latter cannot take them back after an act of bankruptcy. *Milward, assignee of Gates,* v. *Forbes,* 4 Esp. 171. Ellenborough, C. J. 1802.

108. An uncertificated bankrupt takes a shop in his own name, and orders goods in the name of his son, who lives with him: the goods are principally supplied on the guarantee of the father. Held, that the son might sue the assignees for seizing the goods. *Davis* v. *Living and others,* Holt, 275. Gibbs, C. J. 1816.

E. (b) *As indorsee.*

109. A., upon false pretences, obtains a bill from B., and his assignees receive the amount. This is money had and received by the assignees to B.'s use. *Harrison* v. *Walker and another, assignees, &c.* Peake, 111. Kenyon, C. J. 1792.

And see *Willis* v. *Freeman,* 12 East, 656.

110. Bills discounted by bankers, who credit the customer for the amount, after deducting the discount, pass to their assignees, although the balance of accounts was in favour of the customer. *Carstairs and others, assignees of Kensington and Co.* v. *Bates,* 3 Campb. 302. Ellenborough, C. J. 1812.

And see *Tooke* v. *Hollingworth*, 5 T. R. 215; S. C. in error, 2 H. Bla. 501; *Bent* v. *Pullen*, 5 T. R. 494; *Scott* v. *Surman*, Wills, 400, 7; *Parke* v. *Eliason*, 1 East, 544; *Giles* v. *Perkins*, 9 East, 12; *Williams* v. *Everett*, 14 East, 582: *Scott* v. *Franklin*, 15 East, 428. Bills and notes, C. (b)

E. (c) *As reputed owner.*

111. Assignees cannot maintain trover for a ship of which bankrupt was never the registered owner, although defendant claims under the bankrupt. *Taylor* v. *Kinloch*, Stark. 177. Ellenborough, C. J. 1816.

112. The property in goods sent by wholesale dealers to a shopkeeper, *on sale or return*, vests in his assignees. *Livesay* v. *Hood and others, assignees of Almond*, 2 Campb. 83. Lawrence, J. 1809.

113. S. P. *Gibson* v. *Bray and another*, 1 Holt, 556. Gibbs, C. J. 1817.

See *Holroyd* v. *Gwynne*, 2 Taunt. 176, 9; *Godfrey* v. *Furzo*, 3 P. Wms. 185; *Mace* v. *Cadell*, Cowp. 233.

114. Under a *fi. fa.* against a trader, the sheriff (of Cumberland) makes out a warrant, directed to the trader's shopman and another person, by whom the business is conducted in the usual way, but without the interference of the trader, who, on the following day, commits an act of bankruptcy. This is a continuation of the possession of the master, and the goods pass to his assignees. *Jackson and others, assignees of Robinson* v. *Irwin and others*, 2 Campb. 48. Ellenborough, C. J. 1809.

And see *Horn* v. *Baker*, 9 East, 215; *Thackthwaite* v. *Cock*, 3 Taunt. 487.

115. So where the warrant is directed to a regular officer who enters. *Toussaint* v. *Hartop*, Holt, 335. Gibbs, C. J. 1816.

116. Evidence of reputed ownership in the bankrupt may be rebutted by evidence of a contrary reputation of ownership in the true proprietor. *Gurr* v. *Rutton*, Holt, 327. Gibbs, C. J. 1816.

N. And where the joint-stock in trade of A. and B. is in the possession of A. alone, who is the only ostensible partner, the interest of B., the dormant partner, does not vest in the assignees of A.; the interest of A. in the joint property, being equally inconsistent with a true and independent ownership, and a fraudulent possession. *Caldwell* v. *Gregory*, 1 Price, 119.

E. (d) *As trustee.*

117. The payees of a bill delivered it over for a valuable consideration, but forgot to indorse it. After the bankruptcy one of them indorsed the bill. The indorsement was held regular. *Smith* v. *Pickering*, Peake, 50. Kenyon, C. J. 1791.

S. P. *ex-parte* Greening, 13 Ves. 206; Cullen, 100; 1 Mont. 142.

And see 13 Ves. 122.

118. So where a bill was delivered with the intent of transferring the property more than two months before a commission issued, but was not actually indorsed till within the two months, it was held, that the indorsement had relation to the delivery, and that the transaction was within 46 Geo. 3. cap. 135. s. 1. *Anonymous*, 1 Campb. 492. Ellenborough, C. J. 1808.

119. Possession by the bankrupt, of goods which come to his wife as administratix, where some of the next of kin are infants, will not vest the property in the assignees. *Viner, administratrix*, v. *Cadell*, 3 Esp. 88. Eldon, C. J. 1800.

120. But if she takes a beneficial interest in the property, her own share passes to the assignees, who become tenants in common with her in her representative capacity. *Ibid.*

121. A lease is deposited as a security, but no assignment is executed. *Semble*, that the equitable interest of the pledge is not of such a nature as to reduce the estate of the pledgor to a naked trust, which would not pass to his assignees. *Doe d. Maslin, et alt. assignees of W. Smith*, v. *Roe*, 5 Esp. 105. Ellenborough, C. J. 1804.

And see *Carpenter* v. *Marnel*, 3 Bos. and Pul. 40; *Russell* v. *Russell*, 1 Bro. C. C. 269; *Arden* v. *Watkins*, 3 East, 317; *ex-parte* Wetherell, 11 Ves. 398, 401; *ex-parte* Haigh, *ibid.* 404; *ex-*

parte Finden, *ibid*, 405; *Norris* v. *Wilkinson*, 12 Ves. 192; *ex-parte* Mountfort, 14 Ves. 606; *ex-parte* Tayler, 16 Ves. 434; *ex-parte* Langston, 17 Ves. 227; S. C. 1 Rose. 26; *Williams* v. *Everett*, 14 East, 594; *ex-parte* Kensington, 2 V. and B. 83.

E. (e) *Where no beneficial interest.*

122. An accommodation acceptance in the hands of the drawer does not pass to his assignees; it may therefore be indorsed by him for value after an act of bankruptcy. *Wallace* v. *Hardacre*, 1 Campb. 46. Ellenborough, C. J. 1807.

Acc. *Willis* v. *Freeman*, 12 East, 656.

123. A policy of insurance effected by a trader on his own life, passes to his assignees, unless they expressly renounce their claim to it. *Schondler and another, assignees of Davis*, v. *Wace*, 1 Campb. 487. Ellenborough, C. J. 1808.

124. Where the assignees of a bankrupt termor put up the lease for sale, and receive a deposit from a purchaser, they are liable as assignees of the lease, unless they shew that the contract of sale has been rescinded. *Hastings and others* v. *Wilson and others*, Holt, 290. Gibbs, C. J. 1816.

E. (f) *Upon partnership property.*

125. A transfer of partnership property, after an act of bankruptcy by one partner, is valid for a moiety. *Whitwell and others, assignees of Stevens and Hatterley*, v. *Thompson*, 1 Esp. 68, 72. Kenyon, C. J. 1793.

Sed vide *Ramsbottom* v. *Lewis*, post, G. (c) 177.

F. Assignees.

F. (a) *Authority of assignees.*
3 Taunt. 440.

126. One assignee may give a good discharge for a debt owing to the estate, without the concurrence of his co-assignees. *Smith and others* v. *Jamesons*, 1 Esp. 114. Kenyon, C. J. 1794.

S. P. cont. *Carr* v. *Read*, 3 Atk. 695.

127. *Secus*, where the other assignees have expressly dissented. *Bristow and others, assignees of Clark and Gilson*, v. *Eastman*, 1 Esp. 172, 4. Kenyon, C. J. 1794.

128. A release executed by one assignee, *in the presence* of a co-assignee, binds both. *Williams* v. *Walsby*, 4 Esp. 220. Ellenborough, C. J. 1802.

Acc. Lord Lovelace's case, W. Jon. 268. *Ball* v. *Dunsterville*, 4 T. R. 313.

And see Anon cited in 2 Freeman, 215. *Bowyer* v. *Peake*.

129. But if the co-assignee be absent, there must be an authority under seal. *Ibid.* *Harrison* v. *Jackson*, 7 T. R. 207, acc.

F. (b) *Actions by assignees.*

130. Where a party has sold goods, however much under value, his assignees cannot recover the difference as money had and received to their use. *Hogg and others, assignees*, v. *Mitchell*, 1 Stark. 241. Ellenborough, C. J. 1816.

131. Qu. whether, after the removal of one assignee, for not accounting for monies received by him, the remaining assignee may have an action for money had and received for the amount. *Wray, assignee, &c.* v. *Barwis*, Peake, 69. Kenyon, C. J. 1791.

132. S. P. raised, and the action considered to be maintainable at nisi prius, and by the court, upon an application for a new trial, though nothing was decided on this point. *Smith and others, assignees of Lewis and Potter*, v. *Jameson and another*, Peake, 213. Kenyon, C. J. 1794.

S. C. 5 T. R. 601, 3.

133. A debtor cannot resist payment on the ground that he has notice that the creditor is insolvent, and that he is consequently liable to be called upon again by the assignees, in case it should appear that an act of bankruptcy had been committed. *Prickett and Carruthers, and others, assignees of Halliday*, v. *Down and others*, 3 Campb. 131. Ellenborough, C. J. 1811.

S. P. per Grant, M. R. 14 Ves. 557.

Secus, of an executory contract, *Reader* v. *Knatchbull*, 5 T. R. 218 n; *Partridge* v. *Sowerby*, 3 Bos. and Pul.

172; *Lowes* v. *Lush*, 14 Ves. 547; *Franklin* v. *Lord Brownlow*. *Ibid.* 550.

And see *Foster* v. *Allanson*, 2 T. R. 479, 82, 3.

134. Assignees of A. and B. may sue for a debt due to the separate estate of A. without naming B. *Stonehouse and another, assignees of Capiet* v. *De Silva*, 3 Campb. 399. Ellenborough, C. J. 1813.

135. Upon an issue on a plea of payment to debt on bond at the suit of the assignees of the obligee, the assignment is admitted. *Corsbie* v. *Oliver*, 1 Stark. 76. Ellenborough, C. J. 1815.

136. In an action by assignees, defendant cannot establish a plea of set off by merely proving that his cross demand has been allowed by the commissioners. *Pizie and another* v. *Mennett*, 3 Campb. 279. Ellenborough, C. J. 1812.

137. Assignees cannot sue for money received in payment of a bill indorsed by the bankrupt to a creditor, after act of bankruptcy. They must bring trover. *Waller and another, assignees of Smith*, v. *Drakeford*, 1 Stark. 481. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

N. By bringing an action, ex contractu, the assignees, even though they lay the contract as made with themselves, affirm the act of the bankrupt, and thereby entitle the defendant to the right of retaining in satisfaction of his debt or setting off against it. *Smith* v. *Hodgson*, 4 T.R. 211. But, in an action of trover, no set off, either under 2 Geo. II. cap. 22. and 8 Geo. II. cap. 24. or under 5 Geo. II. cap. 30. would be allowed. *Wilkins* v. *Carmichael*, Dougl. 101. And see *Thomason* v. *Frere*, 10 East, 418. *Stainforth* v. *Fellowes*, 1 Marshall, 184.

F. (c) *Liability of assignees.*

138. A trader obtains a bill from J. S. by fraud, and becomes bankrupt. The amount is paid to the assignees. This is money received by them to the use of J. S. *Harrison* v. *Walker and another, assignees, &c.* Peake, 111. Kenyon, C. J. 1792.

But it is said to have been held that it is necessary to shew that the assignees had notice of want of title in the bankrupt. *Kieran* v. *Johnson and another, assignees of Macmaster*, 1 Stark. 109. Bayley, J. 1815.

And see *Willes* v. *Freeman*, 12 East, 656.

139. Assignees may be sued for travelling expenses of a witness, after allowance by the commissioners. *Yarker* v. *Botham, et alt.* 1 Esp. 64. Kenyon, C. J. 1793.

140. Although the witness be also a creditor. *Ibid.*

141. And the proceedings under the commission need not be produced. *Ibid.*

142. The assignees of a bankrupt termor, are not liable to the performance of covenants, unless they take possession. *Bourdillon* v. *Dalton, et alt.* Peake, 238. and 1 Esp. 233. Kenyon, C. J. 1794.

Acc. *Turner* v. *Richardson*, 7 East, 339; S. C. 3 Smith, 330.

And see *Helier* v. *Casebert*, 1 Lev. 127; *Billinghurst* v. *Speerman*, 1 Salk. 297; *Buckley* v. *Pirk*, *Ibid.* 317. *Thomas* v. *Pemberton*, 7 Taunt. 206.

143. Assignees of lessee chosen on the 8th, allowing his cows to remain on the premises till the 10th, and ordering them to be milked there on the 9th, become tenants to the lessor; and if the cows be removed on the 10th, to avoid a distress, he has a right to follow them, under 11 Geo. 2. c. 19. *Welch and another* v. *Myers*, 4 Campb. 368. Ellenborough, C. J. 1816.

144. Merely omitting to deliver up the key, does not amount to taking possession. *Wheeler* v. *Bramah and another, assignees of Borman*, 3 Campb. Ellenborough, C. J. 1813.

145. Nor a payment of rent made for the express purpose of avoiding a distress, to which the effects of the bankrupt are liable. *Ibid.*

146. Assignees give directions to the attorney originally employed, to sue out the commission, pointing out the steps he is to take in the business, They are personally liable for his bill, as upon an original retainer. *Tarn* v. *Heys*, 1 Stark. 278. Gibbs, C. J. 1816.

147. Assignees may make themselves liable to their solicitor, beyond what a master in chancery will allow in tax-

ation. *Finchett* v. *How and Jarratt*, 2 Campb. 278. Ellenborough, C. J. 1809.

148. But *semble*, that they cannot charge the estate with any fees or costs which have not been so allowed. *Ibid.*

149. The provisions of 5 Geo. 2. cap. 30. 1. 45. apply only to the allowance to be made out of the bankrupt's estates, and do not affect the common law liability of the assignees. *Tarn* v. *Heys and another, assignees of Horrock*, Holt, 378. Gibbs, C. J. 1816.

150. A petitioning creditor, though chosen joint assignee, is solely liable for the expenses attending the issuing of the commission; and cannot be sued jointly with his co-assignees. *Ibid.*

151. Where no notice of an intention to dispute the commission is given, the proceedings are *primâ facie*, but not conclusive evidence of the bankruptcy. *Ellis* v. *Shirley*, 3 Campb. 424. Ellenborough, C. J. 1813.

152. In an action against one assignee for contributing at the suit of a co-assignee, who has been compelled to pay the charges of the messenger under the bankruptcy, it need not be proved that the defendant has in his hands any funds from the bankrupt's estate. *Hart* v. *Biggs*, Holt, 245. *Gibbs*, C. J. 1816.

G. Transactions with bankrupt, where protected.

G. (a) *Payments* to *bankrupt*.
(And see F. (b) 133; Assumpsit.

153. A. being embarrassed, sent goods to B., an auctioneer, for sale. Within a few days he surrendered himself to prison; and remaining there two months, was declared a bankrupt. The goods were sold whilst A. lay in prison, and the proceeds were paid to his agent by B., *who had no notice of A.'s imprisonment.* Held, that the payment was protected by 1 Jac. 1 cap. 15. s. 14. *Coles and another, assignees of Wright*, v. *Robins and others*, 3 Campb. 184. Ellenborough, C. J. 1812.

Sed vide *Langston* v. *Boylston*, 2 Ves. 101, 5, 6; *King* v. *Leith*, 2 T. R. 141.

G. (b) *Payments* by *Bankrupt*.

154. Bankrupt's wife was admitted to prove that a payment was made, in contemplation of bankruptcy. *Jourdaine, assignee of Nowlan*, v. *Lefevre and others*, 1 Esp. 66. Kenyon, C. J. 1793.

N. It is stated, that the witness was considered to stand indifferent with respect to her husband's allowance; but unless the estate paid 20s. in the pound, the defendants, the favoured creditors, would not reduce the fund by their proof, in the same proportion that a recovery against them would increase it.

155. The acceptor of a bill informed the holder before it became due, that he was insolvent. The holder promised, if the bill was regularly paid, he would guarantee a composition to the creditors. The bill was paid, and the acceptor became bankrupt. Held, a fraudulent preference. *Singleton et alt.* v. *Butler*, 3 Esp. 215. Eldon, C. J. 1800.

And the court of C. P. refused a rule for a new trial. *Ibid.* and 2 Bos. and Pul. 283.

And see *Smith* v. *Payne*, 6 T. R. 152.

156. A payment made previously to an act of bankruptcy to an obligee, who presses for payment before the bond is forfeited, is good. *Hartshorn et alt. assignees of Wright* v. *Slodden*, 4 Esp. 60. Kenyon, C. J. Maidstone, 1801.

And the court of C. P. set aside a nominal verdict for the plaintiff. *Ibid.* 62. S. C. 2 Bos. and Pul. 582.

And see *Thompson* v. *Freeman*, 1 T. R. 155; *Thornton* v. *Hargraves*, 7 East, 544, 7; *Crosby* v. *Crouch*, 11 East, 256.

157. A transfer on the eve of a bankruptcy is only fraudulent when it is a voluntary act moving from the debtor. *Reed and another, assignees of Proctor a Bankrupt*, v. *Ayton and others*, Holt, 503. Wood, B. York Lent Assizes, 57 Geo. 3. 1817.

158. A trader in contemplation of bankruptcy, voluntarily sends his clerk to make a payment to a creditor; but before the clerk reaches the creditor's house, the creditor makes a personal demand of the debt. Held, that notwithstanding the intention to give a preference, the intermediate demand made

the payment by the clerk valid. *Bayley and others, assignees of Pears,* v. *Ballard and others,* 1 Campb. 416. Ellenborough, C. J. 1808.

159. To invalidate a payment made by a bankrupt, more than two months before the date of the commission, it is not sufficient to shew that the creditor had renewed bills for the debtor, in consequence of the inability of the latter to provide for them; the *insolvency* mentioned in 46 Geo. 3. cap. 135. s. 1. meaning a *general* inability to answer engagements. *Anonymous,* 1 Campb. 492. Ellenborough, C. J. 1808.

And see *Bayly* v. *Schofield,* 1 M. and S. 338, 353, 4, 5.

160. Where the goods of a trader are taken in execution after an act of bankruptcy, though the money levied be paid over to the plaintiff more than two months before the suing out of the commission, the payment is not protected by 46 Geo. 3. cap. 135. s. 1. *Blogg and another, assignees of Harris,* v. *Phillips and another, late sheriff of Middlesex,* 2 Campb. 129. Ellenborough, C. J. 1808.

Sed vide 49 Geo. 3. cap. 121. sect. 2. *Harwood* v. *Lomas,* 11 East, 127.

161. The issuing of the commission means, in these statutes, merely its passing the great seal. It is immaterial whether it be opened and acted upon or not. *Watkins and another, assignees of Bowdler,* v. *Maund,* 3 Campb. 308. Ellenborough, C. J. 1812.

162. Defendants accept bills for the accommodation of a trader, who, after a secret act of bankruptcy, lodges money with them to meet their acceptances. They cannot, under 5 Geo. 2. cap. 30. sect. 28., set-off the amount against their acceptances. *Tamplin and another, assignees, &c.* v. *Diggins and another,* 2 Campb. 313. Ellenborough, C. J. 1809.

163. Nor can they retain it under 19 Geo. 2. cap. 32. sect. 1. as money received *for or in respect of* bills of exchange, in the usual course of trade. *Ibid.*

164. Still less can bankers retain money paid to them after an act of bankruptcy, for the purpose of repaying advances made on the trader's acceptance payable at their shop. *Holroyd and others, assignees of Hall* v. *Whitehead and others,* 3 Campb. 530. Gibbs, C. J. 1814.

And the court of C. P. discharged a rule for a new trial; 1 Mars. 128.

And see *Pinkerton* v. *Marshall,* 2 H. Bl. 334. *Harwood* v. *Lomas,* 11 East, 127.

G. (c) *Transfers from bankrupt.*

165. An assignment by an insolvent trader, who has not committed an act of bankruptcy, as a security for future advances, is valid. *Whitwell and others, assignees of Stevens and Hattersley,* v. *Thompson,* 1 Esp. 68, 72. Kenyon, C. J. 1794.

166. Bankers discount bills for A. and state an account in which they give him credit for the nett proceeds: whilst the bills are running, A. becomes bankrupt; this is a case of mutual credit, and the bankers are not bound to come in under the commission upon the bills which are dishonoured. *Arbouin and another, assignees of Gowen, a bankrupt,* v. *Tritton and others,* Holt, 408. Dallas, J. 1816.

And see *Olive* v. *Smith,* 5 Taunt. 56.

167. If, before an act of bankruptcy, a trader place goods in the hands of a factor for sale, the latter may sell after the bankruptcy, and may retain the proceeds to answer his own debt. *Robson and another, assignees of Blakey,* v. *Kemp and another,* 4 Esp. 233. Ellenborough, C. J. 1802.

168. If a trader deposit a lease as a security, without executing any assignment or mortgage, no legal estate passes to the pledgee. *Doe d. Maslin et alt. assignees of William Smith,* v. *Roe,* 5 Esp. 105. Ellenborough, C. J. 1804.

169. And *semble,* that the equitable interest of the latter is not of such a nature as to prevent the estate from passing to the assignees. *Ibid.*

And see *Matthews* v. *Wallwyn,* 4 Ves. 1, 110. *Jones* v. *Gibbons,* 9 Ves. 407, 11.

170. A trader gives a power of attorney for the purpose of enabling creditor to receive money for his own reimbursement. Money received under this power after an act of bankruptcy, cannot be retained against the assignee. *Hovill, assignee, &c.* v. *Lethwaite,* 5 Esp. 158. Ellenborough, C. J. 1804.

171. A. draws on C. in favour of B.;

C. accepts, in expectation of goods of A., which do not come to his hands till after A. has committed an act of bankruptcy. This is not such a receiving by B. of the proceeds of the goods as will subject him to an action for money had and received at the suit of A.'s assignees. *Waller and another, assignees of Smith*, v. *Drakeford*, 1 Stark. 481. Ellenborough, C. J. 1816.

And the court refused a rule to set aside nonsuit. *Ibid.*

172. Assignees may maintain trover for goods delivered by bankrupt, on sale or return, after a secret act of bankruptcy. *Hurst and others, assignees of Foster*, v. *Gwennap*, 2 Stark. 306. Ellenborough, C. J. 1817.

173. A., an insolvent trader, receives a remittance from B., a creditor abroad, which he delivers to B.'s agent, C. His other creditors afterwards meet and consent, that the bills remitted shall be delivered to C. to hold for the parties ultimately entitled. This is a valid delivery to B.; and the transaction is not affected by the subsequent bankruptcy of A. *Graff and others, assignees of D. J. Vander Hoeven*, v. *Greffulhe*, 1 Campb. 89. Ellenborough, C. J. 1807.

S. P. *Atkins* v. *Barweck*, 1 Stra. 165, as explained in Cowp. 124.

And see *Rowe* v. *Dawson*, 1 Ves. 331.

174. A bill delivered for value by a party, before he becomes bankrupt, may be indorsed by him afterwards. *Smith et alt.* v. *Pickering*, Esp. D. N. P. 40. Kenyon, C. J. 1791.

And the court refused a new trial. *Ibid.*

175. After an act of bankruptcy committed by one partner, an indorsement made by another partner in the name of the firm, is void. *Ramsbottom and others* v. *Lewis and others*, 1 Campb. 279. Ellenborough, C. J. 1808.

Sed vide *Thomason* v. *Frere*, 10 East, 418. *Willis* v. *Freeman*, 12 East, 656. *Whitwell* v. *Thompson*, ante E. (f.) 1.

176. A. ships goods for Hamburgh, and makes out the bills of lading in the name of S. and M. who have no interest in the property, and deposits these bills of lading with B., as a collateral security for his acceptance of A.'s drafts. B. pays his acceptances, and A. becomes bankrupt; B. has a legal claim to the proceeds of the cargo. *Favene and others* v. *Hullett and others*, 1 Campb. 554. Mansfield, C. J. 1808.

177. Defendant having discounted bills for B. required a collateral security, upon which B. at different times, brought goods to defendant in the evening, to be sold to cover the bills, if dishonoured. B. shortly became bankrupt. Held, that the depositing of these goods *at the urgency of the defendant*, was not a voluntary preference, though there was no immediate right of action. *Crosby and another, assignees of Boucher*, v. *Crouch*, 2 Campb. 166. Ellenborough, C. J. 1808.

And the court of K. B. discharged a rule for setting aside nonsuit, 11 East, 256.

178. If a trader sell goods far below their value, neither he nor his assignees can recover the difference. *Mogg and others, assignees*, v. *Mitchell*, 1 Stark. 241. Ellenborough, C. J. 1816.

179. A trader having purchased goods on credit, and fraudulently resold them for ready money, under their value; an action for goods sold and delivered cannot be maintained by his assignees, against the purchaser, to recover the difference between the sums paid and the value of goods. *Burra and others, assignees, &c.* v. *Clarke and others*, 4 Campb. 355. Gibbs, C. J. 1815.

180. A transfer of property made under an apprehension of force, civil or criminal, is valid. *De Tastet* v. *Carroll*, 1 Stark. 88. Ellenborough, C. J. 1815.

And the court of K. B. refused a rule for a new trial. *Ibid.*

181. A. discounts a bill for B., and before it becomes due, has reason to suspect that the acceptance is forged. He takes two constables to an inn, where B. is. Whilst they are in attendance below, he asks B. whether he is aware there is any irregularity in the bill. B. says, "I am; but the whole shall be paid." A. insists upon payment before B. left the room: on which, B. proposes to assign some hops, &c. lying in a rented warehouse. There was evidence, that after the arrangement was acceded to, and before the bill of sale was executed, B. must have been aware the constables were in attendance, as messages were sent up from them, to know whe-

ther they were wanted. The bill of sale was held good against a subsequent bankruptcy. *Atkins and others, assignees of Tredgold,* v. *Seward and others.* Holroyd, J. Winchester Spring Assizes. 1819.

And see post BILLS, B. (b)

H. RIGHTS AND DUTIES OF BANKRUPT.

H. (a) *Allowance.*

182. A bankrupt cannot sue his assignees for his allowance, after they have distributed all the effects. *Groome* v. *Potts et alt. executors of John Neale,* 1 Esp. 396. Kenyon, C. J. 1795.

And see EXECUTORS, B. (b) 1 TRUSTEE 1.

The court of K. B. set aside a nominal verdict for the plaintiff, on the ground that he had not obtained his certificate when the final dividend was declared. 6 T. R. 548.

And see *ex parte* Stiles, 1 Atk. 208. 49 Geo. III. cap. 121, sect. 12.

H. (b) *Interest in property acquired after the bankruptcy.*

183. If an uncertificated bankrupt sell to A. a vessel, of which he is the ostensible owner, A. has a good title against all persons but the assignees. *Laroche, bart. and others,* v. *Wakeman and another,* Peake, 140. Kenyon, C. J. 1792

184. An uncertificated bankrupt may maintain an action for work done, *and materials found,* after the bankruptcy. *Silk* v. *Osborn,* 1 Esp. 140. Kenyon, C. J. 1794.

S. P. as to work done, *Chippendale* v. *Tomlinson,* Co. B. L. 446.

And see *Coles* v. *Barrow,* 4 Taunt. 757.

185. And for money lent after the bankruptcy. *Evans* v. *Brown,* 1 Esp. 170. Kenyon, C. J. 1794.

Sed vide *Kitchen* v. *Bartsch,* 7 East, 53. S. C. 3 Smith, 64.

186. An uncertificated bankrupt may sue for the non-performance of a contract for the delivery of goods, entered into by him subsequent to the bankruptcy, unless the assignees interpose. *Pebenming* v. *Roebuck,* Holt, 172. Gibbs, C. J. 1816.

H. (c) *Protection from arrest.*

187. Bankrupt surrenders within the 42 days. The commissioners may, without an order from the chancellor, enlarge the time for taking his examination; and he is privileged during such enlarged time.* *Davis* v. *Trotter, esq. sheriff of Surrey,* 3 Esp. 40. Kenyon, C. J. 1799.

And the court of K. B. set aside a nominal verdict against the sheriff, for an escape. *Ibid.* and 8 T. R. 475.

Acc. *ex parte* Jackson, 15 Ves. 116, 9.

Sed vide *ex parte* Johnson, 14 Ves. 36, 40.

188. A bankrupt attending a dividend meeting several years after his last examination, is privileged from arrest. *Arding* v. *Flower and Blackhall, sheriff of London,* 3 Esp. 117. Kenyon. C. J. R. 1800.

189. Though he attend upon a notice from the messenger, without a summons from the commissioners. *Ibid.*

And a nominal verdict having been taken for the plaintiff, the court of K. B. directed a nonsuit to be entered. 8 T. R. 534.

And see *Kenyon* v. *Solomon,* Cowp. 156. *Ex parte* Gibbons, 1 Atk. 238. S. C. Co. B. L, 119, 34. *Ex parte* Parker, 3 Ves. 554. S. C. Co. B. L. 119, 34. *Darby* v. *Baughan,* 5 T. R. 209. *Ex parte* Wood, 18 Ves. 1.

H. (d) *Liability upon a new promise.*
And see INFANT, A. (c).

190. In the case of an express promise after certificate, the creditor may declare on the original cause of action; and, if the certificate be pleaded, the subsequent promise may be given in evidence. *Williams* v. *Dyde and others,* Peake, 68. Kenyon, C. J. 1791.

191. S. P. ruled in *Russell* v. *Hardman, ibid.* K. B. M. 1792. *Penn* v. *Bennet, gent. &c. &c.* 4 Campb. 206.

And see *Trueman* v. *Fenton,* 16 East, 421, Cowp. 544; *Leaper* v. *Tatton.*

N. The plea of bankruptcy and certificate given by 5 Geo. II. cap. 30. sect.

7, though it introduces new matter, concludes to the country. The plaintiff, therefore, has no opportunity of *replying* the subsequent promise. Vide *Miles* v. *Williams*, 1 P. Wms. 249, 58.

192. But if the promise be only conditional, the plaintiff must declare specially, and prove the condition performed. *Penn* v. *Bennett, gent. one, &c.* 4 Campb. 205. Ellenborough, C. J. 1815.

N. This case is represented as proceeding on a mis-statement as to the form of the plea of bankruptcy.

193. A promise of payment made by a bankrupt to a creditor, before he has obtained his certificate, is sufficient to revive the debt. *Roberts, assignee of Robertson*, v. *Morgan*, 2 Esp. 736. Eyre, C. J. 1799.

194. And such promise is not destroyed by the certificate obtained afterwards. *Ibid.*

And see *Ernst* v. *Sciaccaluga*, Cowp. 527.

195. Where no notice of dispute is given, a deposition stating an admission by the bankrupt of having committed an act of bankruptcy, is insufficient, unless shewn to have been contemporaneously with, or immediately subsequent to, such act of bankruptcy. *Marsh and another, assignees*, v. *Meager*, 1 Stark. 353. Ellenborough, C. J. 1816.

196. A *general* assertion by a certificated bankrupt, that he will pay every one 20s. in the pound, is not sufficient to revive a debt. *Lynbuy* v. *Weightman*, 5 Esp. 198. Ellenborough, C. J. 1805.

And see *Bailey* v. *Dillon*, 2 Burr. 756; *Berford* v. *Saunders*, 2 H. Bla. 116; *Alsop* v. *Brown*, Dougl. 182. (191.)

197. An admission of the debt is not sufficient. *Fleming* v. *Hayne*, 1 Stark. 370. Ellenborough, C. J. 1816.

198. Although accompanied with an unaccepted offer to pay by instalments. *Ibid.*

I. Certificate.

I. (a) *To what demands a bar.*

199. School-money, payable half yearly, is not a debt until the expiration of the half year; and if the parent become bankrupt before the quarter day, though after the child is gone home for the holidays, the debt is not barred by a certificate. *Parslow* v. *Dearlove*, 5 Esp. 78. Ellenborough, C. J. 1803.

And the court of K. B. refused a rule to set aside a verdict for the plaintiff. *Ibid.* and 4 East, 438. S. C. 1 Smith, 281.

And see ante, C. 40.

200. A note is sent to a banker with a letter, stating it to be a security, and to be delivered to the payee upon a contingency, no cause of action accrues until the event has happened so as to be barred by the stat. *Savage* v. *Aldren*, 2 Stark. 232. Ellenborough, C. J. 1817.

201. Grantor of annuity becomes bankrupt. The annuity is set aside for a defect in the memorial, after he has obtained his certificate. This is a bar to an action by the grantee, to recover back the consideration. *Walker* v. *Liscarray*, 6 Esp. 98. Ellenborough, C. J. 1807.

N. As to the effect of the bankruptcy and certificate of one of several joint-grantors, under 49 Geo. 3. cap. 121, §17; see *Baxter* v. *Nichols*, 4 Taunt. 90; *Page* v. *Bussell*, 2 M. and S. 551.

202. A promise to pay a weekly sum for the support of an illegitimate child, is not barred by certificate, except as to the arrears due at the time of the bankruptcy. *Millen, spinster*, v. *Whittenbury*, 1 Campb. 428. Ellenborough, C. J. 1808.

I. (b) *How pleaded.*

203. A bankrupt cannot give his certificate in evidence under the general issue. *Gowland* v. *Warren*, 1 Camp. 363. Ellenborough, C. J. 1808.

And see *Stedman* v. *Martinnant*, 12 East, 664; *Joseph* v. *Orme*, 2 N. R. 180.

I. (c) *How avoided.*

204. Where a defendant sets up a certificate, and the plaintiff contends that the bankruptcy relied on is a second bankruptcy, under which the defendant has not paid 15s. in the pound, the plaintiff must prove a certificate obtained. But the production of the proceedings under the former commission,

wherein the surrender, and last examination are stated, as sufficient evidence of such former commission. *Gregory* v. *Merton*, 3 Esp. 195. Kenyon, C. J. 1800.

S. P. *Haviland* v. *Cook*, 5 T. R. 655.

205. The certificate must be produced; unless it be in the hands of the opposite party, in which case, after notice, secondary evidence may be given. *Graham* v. *Grill*, 1 Campb. 282. Ellenborough, C. J. 1815.

206. Where there has been no notice to produce the certificate, the affidavit of conformity is insufficient. *Ibid.*

And see *Norton* v *Shakespeare*, 15 East, 619, *Slaughter* v *Cheyne*, 1 M. and S. 1[?]2, as to effect of previous composition with creditors.

207. A replication to a general plea of bankruptcy, stating the special matter, is bad on special demurrer. *Wilson* v. *Kemp*, 3 Campb. 499 n. 2 M. and S. 549. Ante, H. (d) 191.

208. To prove that defendant has been before discharged, it is sufficient, after notice to produce the former certificate, that the solicitor under the commission states that he was employed by defendant to obtain the certificate, and that, from the entries in his books, he has no doubt it was allowed. *Henry* v. *Leigh* 3 Campb. 199. Ellenborough, C. J. 1813

209. But *semble*, that the book kept by the secretary of bankrupts cannot be received as secondary evidence. *Ibid.*

210. Losses by gaming may be given in evidence under the general plea of bankruptcy. *Hughes* v. *Morley*, Holt, 520. Bayley, J. Lancaster Ass. 1817.

211. The plaintiff must elect whether he will give evidence of one loss of 5l or of several losses, amounting altogether to 100l. *Ibid.*

And the court of K. B. confirmed the ruling upon this point. *Ibid.*

212. It lies on the defendant to prove, that he has paid 15s. in the pound, under the second commission. *Gregory* v. *Merton*, *ubi supra.*

213. Where a bankrupt acceptor pleads his certificate, he is *primâ facie* discharged, if it appear that the commission was sued out after the day on which the bill bore date, though before it became due. *Pearson* v. *Fletcher*, 5 Esp. 90. Ellenborough, C. J. 1803.

214. And it lies upon the plaintiff to shew, that an act of bankruptcy was committed before the date of the bill. *Ibid.*

N. The time of the *acceptance*, and not the *date* of the bill, appears to be material.

215. But such antecedent act of bankruptcy is sufficiently shewn by producing the proceedings under the commission, which state, that an act of bankruptcy was committed before the date of the bill. *Ibid.*

And see *ante* H. (d). 195.

216. If a commission issue against a person by the name of A., who is known only by the name of B., a certificate granted to A. is a good bar to an action against B., provided it be proved that he was once called A., and that he was the person against whom, under that name of A., the commission issued. *Stevens* v. *Elizee*, 3 Campb. 256. Ellenborough, C. J. 1812.

BARON AND FEME.

(And see ante, Action, A. 22, 23, Action on the case, A. (a). (b), post, Evidence, H. (f), Witness, B. (a).

A. Marriage.

(a) *How proved.*

(b) *Promise of marriage.*

B. Act of wife, whom it affects.

(a) *Herself.*

(b) *Husband.*

(c) *Person who passes for husband.*

(d) *Strangers.*

A. Marriage.

A. (a) *How proved.*

1. Where coverture is in issue, the husband's former wife is a competent witness to prove her own divorce in a foreign country, without the production

of any document. *Gamer* v. *Lady Lanesborough*, Peake, 18. Kenyon, C. J. 1790.

2. Or it may be shewn, that the husband *de facto* was previously married to another woman. *Ibid.*

3. But an acknowledgment of a marriage, unsupported by proof of an actual marriage, or cohabitation, was not held sufficient. *Anne Wilson* v. *Mitchell*, 3 Campb. 393. Ellenborough, C. J. 1813.

4. If the substance of the marriage act be complied with, the marriage is valid. The form is merely directory. *Standen* v. *Standen and others*, Peake, 32, Kenyon, C. J. 1791.

And see *Nicholson* v. *Squire*, 16 Ves. 259.

5. *Semble*, that the Fleet books are in no case evidence of marriage. *Doe d. Orrel* v. *Madox*, 1 Esp. 197. Kenyon, C. J. Maidstone, 1794.

6. But in all *civil* cases (personal actions,) except the action of crim. con., general reputation is sufficient evidence of marriage. *Leader* v. *Barry*, 1 Esp. 353. Kenyon, C. J. 1795.

Acc. *Morris* v. *Miller*, 1 W. Bla. 632. S. C. 4 Burr. 2057. Sed vide *Dickenson et ux.* v. *Davis*, 1 Stra. 480. And see 2 Roll. Ab. 551, l. 5; *May* v. *May*, Bull. N. P. 112; *Hervey* v. *Hervey*, 2 W. Bla. 877; 1 Wentw. Plead. 42. 2 Saund. 44. c. n.; Bro. Abr. Trial, 16.

Qu. As to proceedings in dower, or where a party makes title under a marriage settlement?

7. Or the declarations of the parties. *Read* v. *Passer*, Peake, 231, and 1 Esp. 213. Kenyon, C. J. 1794.

8. And reputation and declarations as to a marriage celebrated in the *Fleet*, previously to the marriage act are evidence. *Ibid.*

9. The registration of a marriage is not essential to its validity. *Ibid.*

And see *Birt* v. *Barlow*, Dougl. 162, 170.

10. An examined copy of the register of a marriage in the Swedish ambassador's chapel at Paris, is not evidence. *Leader* v. *Barry*, *ubi supra.*

11. *Semble*, that a Jewish marriage is not sufficiently proved in a civil action, by witnesses present at the ceremony which takes place in the synagogue, and which is merely a ratification of a previous contract in writing; and that the original contract must be produced. *Horn* v. *Noel*, 1 Campb. 61. Ellenborough, C. J. 1807.

12. In an action for crim. con., where the plaintiff was married at the chapel in the tower, he must prove that banns were usually published there before the marriage act. *Taunton* v. *Wyborn*, 2 Campb. 297. Ellenborough, C. J. 1809.

Acc. *Rex* v. *Northfield*, Dougl. 659.

13. But it will be *primâ facie* sufficient to produce an old register of marriages, solemnized in the chapel before the act, and a register of the publication of banns since that period, corroborated by evidence of the frequent publication of banns, and solemnization of marriages there of late years. *Ibid.*

14. Proof that a foreigner was received at the court of her own sovereign, as the wife of a person of the same nation, that she generally was regarded as his wife in that country, and that the parties cohabited some time in England, is, in a civil proceeding, presumptive evidence of coverture. *Kay* v. *Duchesse de Pienne*, 3 Campb. 123. Ellenborough, C. J. 1811.

15. Coverture may be given in evidence under *non est factum*. *Lambert* v. *Atkins*, 2 Campb. 272. Ellenborough, C. J. 1809.

A. (b) *Promise of marriage.*

16. Brutal or violent conduct, or threats of ill usage, afford a legal excuse for breaking off an engagement. *Leeds* v. *Cooke et ux.* 4 Esp. 256. Ellenborough, C. J. 1803.

17. So dishonesty and perjury. *Baddeley* v. *Mortlock and Wife*, Holt, 151. Gibbs, C. J. 1816.

18. But mere reports and suspicions are not sufficient. *Ibid.*

19. But an omission on the part of the plaintiff to clear his character, affects the damages. *Ibid.*

And see *Holcroft* v. *Dickenson*, Carter, 233, 5; *Harrison* v. *Cage*, 1 Lord Raym. 386, 7; Pothier, *Traité du Contrat de Mariage*, part 2, chap. 1, art. 7, where the different circumstances which will, and which will not justify a renun-

tiation of the contract, are fully discussed.

See also post, EVIDENCE, G. (c); 4 Bac. Abr. Marriage and Divorce, B. And, as to disparagement, see Co. Litt. 80. a. b.

20. From a statement to the father, by the defendant, that he has pledged himself to marry the plaintiff within six months, the jury may infer a promise to marry generally, *i. e.* within a reasonable time. *Potter* v. *Deboos*, 1 Stark. 82. Ellenborough, C. J. 1815.

B. ACT OF WIFE, WHOM IT AFFECTS.

B. (a) *Herself.*

21. A separate maintenance, not secured by deed, will not make a wife liable upon her own contracts. *Stedman* v. *Gooch*, 1 Esp. 4, 7. Kenyon, C. J. 1793.

Acc. *Elluh* v. *Leigh*, 5 T. R. 679.

N. In *Marshall* v. *Rutton*, 8 T. R. 545, it was settled, that no separate maintenance will make the wife personally liable. It may, however, discharge the husband; post. B. (b) 3, 9.

22. Where a woman is let in to plead under terms of not availing herself of her coverture, she is precluded from shewing, that the goods were delivered on her husband's credit. *Snell* v. *Rice*, Peake, 235, and 1 Esp. 221. Kenyon, C. J. 1792.

24. Held, that where a husband, a foreigner, leaves the kingdom and is absent some years, the wife is chargeable for goods furnished since his departure. *Walford* v. *Duchesse de Pienne*, 2 Esp. 554. Kenyon, C. J. 1797.

25. And that although the credit commenced during the husband's residence in England, the creditor may recover for such part of the account as accrued after his departure. *Franks* v. *Duchesse de Pienne*, 2 Esp. 587. Kenyon, C. J. 1797.

26. But it seems to be now settled, that the wife cannot be sued where the husband has at any period lived with her within the realm. *Kay* v. *Duchesse de Pienne*, 3 Camp. 123. Ellenborough, C. J. 1811, and K. B. H. 1812.

And see *Deerly* v. *Duchess of Mazarine*, 1 Salk. 116; S. C. 2 Salk. 646; S. C. 1 Lord Raym. 147; *Boggett* v. *Frier*, 11 East, 301; *Burfield* v. *Duchesse de Pienne*, 2 N. R. 380; *Compton* v. *Collinson*, 1 H. Bla. 348, 9.

27. Husband residing in the West Indies, allows the wife a weekly sum for her subsistence. She cannot be sued alone. *Wm. M'Namara and Margaret, his wife*, v. *Fisher (in error,)* 3 Esp. 18. Kenyon, C. J. 1799.

S. C. not S. P. 8 T. R. 302.

Acc. *Farrer* v. *Granard*, 1 New Rep. 80; *Boggett* v. *Frier*, 11 East, 301.

Sed vide Eliz. Wilmot's case, Moore, 851; *Castleton* v. *Fitzwilliams*, Cary's Rep. 143, 4; *Dubois* v. *Hole*, 2 Verr. 613; Anon. 1 Bulstr. 140.

28. A woman whose husband has been transported may, after the expiration of the term of transportation, sue upon a cause of action which accrued during that period, unless it can be shewn that the husband has returned. *Carroll* v. *Blencow*, 4 Esp. 27. Alvanley, C. J. 1801.

And see *Boggett* v. *Frier*, 11 East, 303. Co. Litt. 132. b. *Jewson* v. *Read*, Lofft. 142.

29. A widow is liable for debts contracted by her before coverture. *Woodman* v. *Chapman, widow*, 1 Campb. 189. Ellenborough, C. J. 1808.

S. P. arg. *Mitchinson* v. *Hewson*, 7 T. R. 350; 1 Roll. Abr. 351, (G.) pl. 2.

B. (b) *Husband.*

And see ante, ACTION, A. 22, 3; 2 Saund. 47. b, i; F. N. B. 177 H. note (e).

30. A debt due from the wife *dum sola*, cannot be set off in an action brought by the husband alone. *Wood* v. *Akers*, 2 Esp. 594. Eyre, C. J. 1797.

S. P. e converso, Bull, N. P. 179.

And see *Robarts* v. *Mason*, 1 Taunt. 254; F. N. B. 121 C. 120 F.

31. *Secus*, where the husband has expressly ordered the debt to be paid. *Ibid.*

And see AGREEMENT, A. (b) 22.

32. Where, in an action against husband, the former gives an undertaking to appear for himself *only*, and appears accordingly, and an appearance is entered for the wife, sec. stat. on an affidavit of service, the husband must *plead*

for both. *Russell* v. *Buchanan*, Exch. M. T. 1818. Manning's, Exch. Pra. 625, 6, 7, 8.

33. A man who marries a widow and receives her children into his family, is liable for contracts made by the wife in his absence, for the education of such children. *Stone* v. *Carr*, 3 Esp. 1. Kenyon, C. J. 1799.

And see *Cooper* v. *Martin*, 4 East, 76, 82.

34. Where a deed of separation is executed by the husband and wife, but not by the trustee appointed on behalf of the latter, it is void, and cannot be set up as a defence to an action against the husband for necessaries furnished to the wife after he has refused to receive her into his house. *Ewers* v. *Hutton*, 3 Esp. 255. Kenyon, C. J. 1801.

35. But where husband and wife live apart, and he pays her an adequate allowance, he is not liable for her debts, although there be no written agreement with respect to the allowance. *Hodgkinson and another* v. *Fletcher*, 4 Campb. 70. Ellenborough, C. J. 1814.

36. The adequacy of the allowance is a question of fact for the jury. *Ibid.*

37. The wife's receipts are not admissible to prove that a separate maintenance has been paid. *Ibid.*

38. A man who permits his children to live with his wife, gives her an implied authority to purchase necessaries for them. *Rawlins* v. *Vandyke*, 3 Esp. 250, 2. Eldon, C. J. 1800.

39. A man who turns his wife out of doors, is liable for necessaries furnished to her, though he caution the public, and even the plaintiff individually, not to give her credit. *Harris* v. *Morris*, 4 Esp. 41. Kenyon, C. J. 1801.

S. P. *Bolton* v. *Prentice*, 2 Stra. 1214, *better reported in* Selw. 249.

And see *Thompson* v. *Hervey*, 4 Burr. 2177.

40. So where the husband will not receive his wife into his house. *Rawlins* v. *Vandyke*, *ubi supra*.

41. Or the wife is so ill-treated by her husband, as to render it unsafe for her to live with him. *Hodges* v. *Hodges*, 1 Esp. 441. Kenyon, C. J. 1796.

And see *Aldis* v. *Chapman*, Selw. 263; *Horwood* v. *Heffer*, 3 Taunt. 421.

42. A husband who turns his wife out of doors is liable for the costs of articles of the peace, which it is necessary, for her safety, to exhibit against him. *Shepherd, one, &c.* v. *Mackoul*, 3 Campb. 326. Ellenborough, C. J. 1813.

And see 20 H. 7. 2 b. *per Fineux ad finem.*

43. A husband is liable for the expences of a defence upon an indictment against the wife for keeping a bawdy house, where it appears that he was privy to her doing so, and that he knew she was defended by the plaintiff. *Ibid.*

44. A husband cannot be sued for the amount of goods furnished to his wife by a tradesman, who has notice of a separate maintenance. *Rawlins* v. *Vandyke*, *ubi supra*.

And see *Morton* v. *Withens*, Skinn. 348; *Nurse* v. *Craig*, 2 N. R. 148; *Ozard* v. *Darnford*, Selw. 261. 4 Burr. 2177.

45. If, on a separation, the wife is adequately provided for, though from funds of her own, the husband is not liable for her debts. *Liddlow* v. *Wilmot*, 2 Stark. 86. Ellenborough, C. J. 1817.

46. But he may be sued on a promise, even though made under a mistake, as to his legal liability. *Hornbuckle* v. *Hornbury*, 2 Stark. 177. Ellenborough, C. J. 1817.

47. A husband not living with his wife, is liable for unnecessary articles of dress ordered by her, if he, being present when they are sent home, do not enforce a demand made by the tradesman to have them returned. *Waithman and another* v. *Wakefield, esq.* 1 Campb. 120. Ellenborough, C. J. 1807.

48. A husband living apart from his wife, is liable for expenses suitable to the appearance which he allows her to assume, however disproportionate to his real circumstances. *Ibid.*

49. But where a tradesman neglects the means of ascertaining the true situation of the husband, the latter is liable only for necessaries suitable to his circumstances. *Ibid.*

50. Where a woman residing with her husband, without his privity, orders excessive quantities of apparel, which are supplied on her personal credit, and are attempted to be secured by a promissory note given in her own name, the husband is not liable for any part of the goods, though it do not appear

that he has supplied her with necessaries. *Metcalfe* v. *Shaw*, 3 Campb. 22. Ellenborough, C. J. 1811.

And see *Bentley* v. *Griffin*, 5 Taunt. 356.

B. (c) *Person who passes for her husband.*

51. A man who holds a woman out to the world as his wife, and allows her to use his name, is liable for her engagements, although the creditor know that the parties are not married. *Watson* v. *Threlkeld*, 2 Esp. 637. Kenyon, C. J. 1798.

52. At least, when the parties are married *de facto*, and creditor has been informed that the man has another wife living, the husband is liable for the engagements of the second wife, except, perhaps, in the case where the creditor can be fixed with knowledge of the celebration of the first marriage. *Robinson* v. *Nahon*, 1 Campb. 245. Ellenborough, C. J. 1808.

53. On non assumpsit by parties sued, as husband and wife, upon the contract of the latter, *dum sola*, it may be shewn that there is a former husband living. *Cowley* v. *W. Robertson, and M. his wife*, 3 Campb. 438. Ellenborough. C. J. 1813.

54. A man is conclusively liable for necessaries supplied to a woman while he is living with her as his wife; but he is not liable for necessaries supplied to a woman on the ground that he has formerly lived with her and represented her as his wife, if they were not married. *Munro* v. *De Chemant*, 4 Campb. 215. Ellenborough, C. J. 1815.

B. (d) *Strangers.*

55. Where a note is made payable to the order of a person, whom the maker knows to be a married woman carrying on trade with the consent of her husband, the property vests in the husband, and the indorsement of the wife in her own name is a nullity. *Barlow* v. *Bishop*, 3 Esp. 266. Kenyon, C. J. 1801.

And the court of K. B. set aside a nominal verdict for the plaintiff. *Ibid.* and 1 East, 432.

56. But in a subsequent case, where the maker promised payment to the indorsee after the note was due, it was held, that it might be presumed that the payee had authority from her husband to indorse the note and also to indorse it in her own name. *Cotes* v. *Davis*, 1 Campb. 485. Ellenborough, C. J. 1808.

N. *Sed quære*, whether the declaration should not have stated the indorsement to have been made by or on behalf of the husband? And see *Hodges* v. *Beverley*, Bunb. 188.

BARRISTER.

(And see post, PRACTICE, H. K. (f) WITNESS, B. (c) D. (d).)

1. No action lies against a barrister for negligence, however gross. *Fell* v. *Brown, esq.* Peake, 96. Kenyon, C. J. 1791.

And see 1 Roll. Abr. 91, pl. 9, 10, 12. *Ibid.* 96, pl. 7; *Regina* v. *Helston*, 10 Mod. 202; 14 H. 6, 18 b. per Paston.

2. Or to recover a fee given to a barrister to argue a cause which he did not attend. *Turner* v. *Philipps, esq.* Peake, 122. Kenyon, C. J. 1792.

Cont. 1 Roll. Abr. 91, pl. 11.

And see *Moor* v. *Row*, Cha. Rep. 38. Co Litt. 295. n. 252; *Chorley* v. *Bolcot*, 4 T. R. 317; 37 H. 6, 86; 37 H. 6, 18; *Penrice* v. *Parker*, Finch, 75; *Thornhill* v. *Evans*, 2 Atk. 330; F. N. B. 172 H.

BASTARDS.

A. LIABILITY OF PUTATIVE FATHER.

(a) *At common law.*

(b) *By statute.*

A. LIABILITY OF PUTATIVE FATHER.

(a) *At common law.*

1. A person who admits a bastard child to be his, and visits it whilst at nurse, is liable for the nursing, though no order of filiation or maintenance have been made. *Hesketh* v. *Gowing*, 5 Esp. 131. Ellenborough, C. J. 1804.

2. And if the child, after being brought away by the father, be taken back against the consent of the latter, who, however, takes no steps to remove it, his acquiescence in the child's remaining there upon the former implied contract, may be presumed. *Ibid.*

3. A promise to pay a weekly sum towards the support of an illegitimate child is not discharged by bankruptcy and certificate, except as to the arrears due before the act of bankruptcy. *Millen, spinster*, v. *Whittenbury*, 1 Campb. 428. Ellenborough, C. J. 1808.

A. (b) *By statute.*

4. A promissory note given to an overseer upon an agreement, by which the parish stipulate to accept a sum certain in lieu of weekly payments, is valid only as an indemnity. *Wilde* v. *Griffin*, 5 Esp. 142. Ellenborough, C. J. 1804.

And see *Beeleu* v. *Wingfield*, 11 East, 467. 1 M. and S. 210. 2 Marsh, 226.

5. Therefore where a sum sufficient to cover the actual expenses has been already paid, the overseer can maintain no action on the note. *Ibid.*

S. P. *Cole* v. *Gower*, 6 East, 110. S. C. 2 Smith, 246.

6. A person who pays money under an order of maintenance for a period, during which the child was, without his knowledge, supported in the Foundling Hospital, may recover the amount from the party into whose hands the money was paid. *Hodgson* v. *Williams*, 6 Esp. 29. Mansfield, C. J. 1806.

7. But the overseer, though liable to refund the money, may be indicted for attempting to secrete it. *Rex* v. *Martin*, 2 Campb. 268. Ellenborough, C. J. Maidstone, 1809.

8. Where a voluntary payment was made in pursuance of a composition with the parish, the surplus, after deducting the charges actually incurred, may be recovered in an action for money had and received. *Stainforth* v. *Staggs*, 1 Campb. 398. Lawrence, J. York, 1808.

And the court of K. B. refused a rule to set aside a verdict for the plaintiff; *ibid.* 564.

9. So where the money is paid whilst the plaintiff was in custody under a warrant. *Townson* v. *Wilson and others*, 1 Campb. 396. Ellenborough, C. J. 1808.

10. Or under the threat of an action. *Wilde* v. *Griffin*, 5 Esp. 142. Ellenborough, C. J. 1804.

11. If it appear that part of the money has been expended on the child, who is since dead, the surplus may be recovered. *Townson* v. *Wilson and others, ubi supra.*

12. And the parties receiving the money are not discharged by paying it over to their successors in office. *Ibid.*

And see AGENT E. 113.

13. It lies upon the overseer to prove what expenses have been incurred. *Watkins* v. *Hewlett*, Dallas, C. J. Guildhall, 1 March, 1819.

BILLS AND NOTES.

F. PROTEST.

G. NOTICE OF DISHONOUR.

(a) *How given.*

(b) *When necessary.*

(c) *Consequences of neglect.*

(d) *When waved.*

H. LIABILITY OF DRAWER OF BILL, AND INDORSER OF BILL OR NOTE.

(a) *Where liable.*

(b) *To what extent.*

(c) *Where discharged.*

I. ACTION.

(a) *Title of plaintiff.*

(b) *At what period right of action accrues.*

(c) *Facts necessary to be proved.*

(d) *Indebitatus assumpsit, in respect of bills and notes.*

(e) *Trover for notes and bills.*

A. WHEN VALID.

(And see STAMPS D.)

A. (a) *Form of bill or note.*

1. A promissory note issued by a commercial company, consisting of more than six persons, who are not bankers, is not within the prohibition of the Bank Act, 15 Geo. II. cap. 13. sect. 5. *Wigan* v. *Fowler and others*, 1 Stark. 459. Ellenborough, C. J. 1816.

And the court refused a rule to set aside verdict. *Ibid.*

2. An instrument containing an acknowledgment of having received an acceptance, and an undertaking to provide for it, was held not to be a promissory note, but to require a *receipt* stamp. *Scholey* v. *Walsby*, Peake, 24. Kenyon, C. J. 1790.

Sed vide *Appendix* IV.

3. "I O U eight guineas," was held to be neither a promissory note nor a receipt; and it was therefore received in evidence without a stamp. *Fisher, gent.* v. *Leslie*, 1 Esp. 426. Eyre, C. J. or Kenyon, C. J. 1795.

4. S. P. *hæsitanter.* *Israel* v. *Israel*, 1 Campb. 499. Ellenborough, C. J. 1808.

And see STAMPS A. (b). 11 H. 6, 39.

5. But in *Guy* v. *Harris*, Chitty, 345, n. Eldon, C. J. 1800, such an instrument was held to be a promissory note, though not negotiable.

Sed vide Dyer, 206, pl. 122.

And see infra, § 10.

6. A joint and several note, expressing no time of payment, has, *when signed*, an indorsement, which states, that it is given as a security for the balances which one of the makers may owe to the payee, that it is to be in force for six months, and that no money is to be called for sooner in any case. The payee can neither declare upon this instrument as a promissory note payable on demand, nor as payable at six months. Between these parties the instrument is an agreement, and must be stamped and declared upon as such; though *possibly* it might be considered as a promissory note in the hands of a *bonâ fide* indorsee. *Leeds and others* v. *Lancashire*, 2 Campb. 205. Ellenborough, C. J. 1809.

7. So if a note, before it is signed, be indorsed with a memorandum, that the note shall be void on the happening of a contingent event;—it is not within the statute, 3 and 4 Ann. cap. 9. *Hartley* v. *Joseph Wilkinson and another*, 4 Campb. 127. Ellenborough, C. J. 1815.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.*

8. A defeasance indorsed by the payee is not part of the contract, unless shewn to have been written at the time the instrument was made. *Stone* v. *Metcalfe*, 4 Campb. 217. Ellenborough, C. J. 1815.

And see *Hill* v. *Halford*, 2 Bos. and Pul. 413. *Coleman* v. *Cooke*, Willes, 393.

9. An instrument acknowledging the receipt of a bill of exchange which has two months to run, and promising to *pay* the amount with interest, cannot be declared upon as a promissory note; being a special undertaking to *repay* the amount of the bills, *if honoured at maturity*. *Williamson and another* v. *Bennett and Mitchell*, 2 Campb. 417. Ellenborough, C. J. 1810.

Vide supra, § 2, 3, 4. *Haussoullier* v. *Hartsinck*, 7 T. R. 733.

10. "I promise to pay, &c." signed by two persons, is a joint *and several* note. *March* v. *Ward*, Peake, 130. Kenyon, C. J. 1792.

11. A note payable to A. only, without the words "*bearer*" or "*order*," is a valid note within the statute. *Smith* v. *Kendal, executor*, 1 Esp. 231. Kenyon, C. J. 1794.

And the court of K. B. set aside a verdict which had been taken nominally for the defendant. *Ibid.* and 6 T. R. 123.

S. P. *Burchell* v. *Slocock*, 2 Lord Raym. 1545. *Moor* v. *Paine*, Ca. temp. Hardw. 288.

Acc. as to *bills*, the entries in *Ewers* v. *Benchkin*, 1 Lutw. 231, 2. *Mannin* v. *Cary*, *ibid.* 277; and as to bills *and notes*, Clift. 916.

12. A promissory note, purporting to be the note of A. only, cannot be declared upon as the note of A. and B. though given to secure a partnership debt. *Siffkin* v. *Walker and Rowlestone*, 2 Campb. 308. Ellenborough, C. J. 1809.

Acc. *Emly* v. *Lye*, 15 East, 7.

13. But if A. make a note by the words "I pay, &c." and prefix to his signature, "*for A. and B.*," the firm is bound. *Lord Galway* v. *Matthew and Smithson*, 1 Camp. 403. Ellenborough, C. J. 1808.

14. So where a bill drawn upon a firm is accepted by one partner in his own name, the partnership is liable. *Mason* v. *Rumsey, senior, and Rumsey, junior*, 1 Campb. 384. Ellenborough, C. J. 1808.

15. But if a note be signed by A. without any previous agreement that B. shall be a party, and B. afterwards adds his name as a surety, he is not bound without an additional stamp. *Clerk* v. *Blackstock*, Holt, 474. Bayley, J. Carlisle, 1816.

16. Declaration stated that the defendants made the bill, "their own proper *hands* being thereunto subscribed."—The bill was subscribed by one of the defendants, with their firm of A. and Co. Lord Ellenborough doubted whether the variance was fatal or not, but refused to nonsuit the plaintiff. *Jones and another* v. *Mars and another*, 2 Campb. 305. Ellenborough, C. J. 1809.

And see *Carvick* v. *Vickery*, Douglas, 653.

17. If a bill purport to be drawn by a firm "to our order," in an action by the first indorsee against the acceptor, the declaration may aver that certain persons using the firm drew the bill, although in fact the drawer has no partner. *Bass* v. *Clive*, 4 Campb. 78. Ellenborough, C. J. 1814.

And the plaintiff having been nonsuited with leave to move to set the nonsuit aside, a rule for that purpose was made absolute. *Ibid.* and 4 M. and S. 13.

18. A bill purporting to be given for value *delivered* in leather, may be stated to be for value *received* in leather, both phrases expressing the same fact. *Jones* v. *Mars*, *ubi supra.*

And see *White* v. *Ledwick*, Bayl. 16, n.

19. Plaintiff declares upon a bill *made* on the 3d February. The production of the bill *bearing date* on the 6th, does not render it necessary for the plaintiff to shew, that it was made on the 3d, the day being immaterial, though not laid under a *videlicet*. *Coxon* v. *Lyon*, 2 Campb. 307, n. Thompson, B. York, 1810.

20. But if the declaration had described the bill as *bearing date* on the same day, the variance would have been fatal. *Anon.* 2 Campb. 308, n. Ellenborough, C. J. 1809.

S. P. *Baynham* v. *Matthews*, Fitzg. 130.

21. To prove that an unstamped bill dated Paris was drawn in England, it is not sufficient to shew that the drawer was in England at the time the bill bears date. *Abraham* v. *Du Bois*, 4 Campb. 469. Ellenborough, C. J. 1815.

22. An instrument whereby the maker requests the party to whom it is addressed, to pay 15l. "out of his half pay, which will become due the 1st of January," is not a bill of exchange. *Stevens* v. *Hill*, 5 Esp. 247. Ellenborough, C. J. 1805.

S. P. *Josselyn* v. *L'Acier*, 10 Mod. 294, 316.

And see *Evans* v. *Underwood*, 1 Wils. 262. *Jenney* v. *Herle*, 2 Lord Raymond, 1361, 2, S. C. 1 Stra. 591. S. C.

8 Mod. 25; *Hill* v. *Halford*, 2 Bos. and Pull. 413.

26. A bill payable after sight may be proved to have been accepted on a different day from that laid in the declaration under a scilicet. *Freeman* v. *Jacob*, 4 Campb. 209. Ellenborough, C. J. 1815.

N. This being matter of allegation, the *scilicet* appears to be immaterial.

A. (b) *Distinction between bill and note.*

27. A stamped paper writing in the common form of a bill of exchange, except that the word "at" is inserted before the name of the drawee, is properly declared on as a bill of exchange. *Shuttleworth* v. *Stephens*, 1 Campb. 407. Ellenborough, C. J. 1818.

28. *Semble*, that such an instrument may be treated as a bill of exchange, or a promissory note, at the holder's option. *Ibid.*

29. *A fortiori* where "at" is written so as to be scarcely legible, for the purpose of completing the deception. *Allan* v. *Mawson*, 4 Campb. 115. Gibbs, C. J. 1815.

A. (c) *Alteration.*

(And see STAMPS, D.)

30. A bill, the date of which is altered after it is due, but before it is negotiated, is invalid, without a fresh stamp. *Bowman* v. *Nicolls*, 1 Esp. 81. Kenyon, C. J. 1794.

And the court of K. B. discharged a rule for a new trial. 5 T. R. 537.

31. A bill delivered to the payee, and afterwards altered in date by an agreement between him and the drawee, before acceptance, is void. *Walton* v. *Hastings*, 4 Campb. 223. Ellenborough, C. J. 1815.

32. An alteration to vitiate a bill must be in a material part, as in the time of payment, or sum. *Trapp* v. *Spearman*, 3 Esp. 57. Kenyon, C. J. 1799.

33. But the insertion of a particular place of payment by the acceptor, does not make the bill void. *Ibid.*

34. Nor where the addition of a particular place of payment is made, without the privity of the acceptor; as the words inserted do not alter the nature of the acceptor's liability. *Marson* v. *Petit*, 1 Campb. 82, n. Ellenborough, C. J. 1806.

Sed vide Appendix III. post. E. (b) 2.

35. An alteration of the date, in correction of a mistake and of the place of payment, made before negotiation and with the acquiescence of the party, is immaterial. *Jacobs* v. *Joseph Hart*, 2 Stark. 45. Ellenborough, C. J.

36. The words "accepted on myself, payable every where," inserted by the maker, in the margin of a note, payable seven days after sight, constitute no part of the original instrument, being merely an acknowledgment of *sight*. *Splitgerber* v. *Kohn*, 1 Stark. 125. Ellenborough, C. J. 1815.

37. The date of a bill cannot be altered after acceptance, though accepted for the accommodation of the drawer, who has not negotiated it. *Calvert* v. *Roberts*, 3 Campb. 342. Ellenborough, C. J. 1813.

38. Where a bill indorsed by the drawer was left with the drawee, who dated it forwards before he accepted it, the alteration was held fatal. *Outhwaite and another* v. *Luntley*, 4 Campb. 179. Ellenborough, C. J. 1815.

S. P. *Johnston* v. *Gibb*, K. B. E. T. 1815.

39. The circumstance that the drawer would have farther time to provide for the bill, in the event of non-payment, furnishes no ground to presume his assent. *Ibid.*

40. Nor would the consent be of any avail. *Ibid.*

N. It seems therefore that the bill was presented for acceptance by an indorsee.

41. An exchange of accommodation acceptances, is a sufficient negotiation of the bills to make them invalid, if altered in date, without a fresh stamp. *Cordwell (or Cardwell)* v. *Martin*, 1 Campb. 79. Ellenborough, C. J. 1807.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* 180, b. and 9 East, 190.

43. In an action against an acceptor where the bill is vitiated by the insertion of "date" instead of "sight," the plaintiff cannot recover upon the money counts, though he produce another bill drawn on the defendant by the same drawer, *but not accepted*. *Long* v. *Moore*, 3 Esp. 155, n. Kenyon, C. J. 1790.

Sed vide *Paton* v. *Winter*, 1 Taunt. 420.

43. A bill which, *after delivery* by drawer to payee, is post dated five days at acceptor's request, is void. *Walton* v. *Hastings*, 1 Stark. 215. Ellenborough, C. J. 1816.

B. Consideration.

B. (a) *Sufficient.*

44. Where there was originally no consideration for part of the sum expressed in the bill, the jury, in an action between the immediate parties, may apportion the damages, although money be paid into court on the count upon the bill. *Barber* v. *Backhouse and others*, Peake, 91. Kenyon, C. J. 1800.

N. But where part of the consideration arises out of an *illegal* contract, the *security* is void for the whole, and the plaintiff must resort to his original remedy, upon the valid branch of the consideration, per Denison, J. 2 Burr. 1082.

45. Where the defendant accepts a bill in consideration of his being admitted into partnership by the plaintiff, and the treaty is afterwards broken off by the defendant, the plaintiff can recover only to the extent of the injury which he has sustained by the non-performance of the contract. *Ledger* v. *Ewer*, Peake, 216. Kenyon, C. J. 1794.

46. And if it appear that the plaintiff obtained the acceptance by fraud, the defendant will be entitled to a verdict. *Ibid.*

Acc. *Lewis* v. *Cosgrave*, 2 Taunt. 2, 4, post, § 53.

47. But where a bill was given for the price of goods, it is no defence that the goods were of bad quality and improperly packed; the defendant must have recourse to a cross action; the distinction being between failure of consideration, and original want of consideration. *Tye* v. *Gwynne*, 2 Campb. 346. Ellenborough, C. J. 1809.

48. So where a bill accepted as a *gift* to the payee, is indorsed for a small consideration, the indorsee can recover only to that extent. *Nash* v. *Brown*, Chitty on Bills, 93. Ellenborough, C. J. 1817.

49. So upon a sale of pictures, inadequacy of price cannot be given in evidence against the amount of the note given, unless it be offered as proof of fraud, with a view to defeat the contract altogether. *Solomon* v. *Turner*, *bart.* 1 Stark. 51. Ellenborough, C. J. 1815.

50. A cross acceptance with an exchange of securities, is a good consideration for a note. *Kent* v. *Lowen*. 1 Campb. 179, n. Ellenborough, C. J. 1808.

And see *Buckler* v. *Buttivant*, 3 East, 72. S. C. Co. B. L. 178, 510. *Franco* v. *Dubois*, 2 Smith, 36. *Ex parte Walker*, 4 Ves. 373. S. C. Co. B. L. 174. Bayley, 265.

51. A. being indebted to B. it is agreed that C. shall draw a bill upon A. in favour of B. for the amount. In an action by B. against C. the latter cannot set up want of consideration as a defence. *Scott and others* v. *Lifford*, 1 Campb. 246. Ellenborough, C. J. 1808.

And see Anon. 1 Com. Rep. 43.

52. A. the drawer and payee of a bill for £50, being bound to provide for a bill of £70, of which B. is the holder, indorses the £50 bill to B. to enable him to take up the bill for £70, this is an available security in the hands of B. in reduction of his demand on A. and he may recover upon it against the acceptor. *Walsh* v. *Tyler*, 2 Stark. 288. Ellenborough, C. J. 1817.

53. It is no defence to an action by the drawer and payee of a bill against the acceptor, that the consideration has *partially* failed on account of the badness of the quality of the goods delivered. *Morgan* v. *Richardson*, 1 Campb. 40, n. Ellenborough, C. J.

S. C. Law Journal, 2 vol. 237. S. C. 7 East, 483, n. S. C. 3 Smith, 487, n.

And see Selw. 161, n.

51. So where a bill is given upon an agreement for the lease of a house, *and the defendant has had possession*, he cannot set up a refusal on the part of the plaintiff to execute the lease, but must have recourse to a cross action or suit in equity. *Moggridge* v. *Jones*, 3 Campb. 38. Ellenborough, C. J. 1811.

And the court of K. B. refused a rule for a new trial. *Ibid.* and 14 East, 486.

53. But where the partial failure of consideration arises from the fraud of the plaintiff, it is a bar to the action. *Fleming* v. *Simpson*, 1 Campb. 40, n. Ellenborough, C. J. 1806.

S. P. *Lewis* v. *Cosgrave*, 2 Taunt. 2. And see ante B. (a); 46 post, VENDOR and PURCHASER.

B. (b) *Legal.*

54. In an action by the indorsee against the maker of a note, the latter cannot set up as a defence, that the consideration was illegal, unless it can be shewn, that the plaintiff was privy to the illegal transaction. *Newby* v. *Smith*, 2 Esp. 539, n. Kenyon, C. J. 1788.

And see Chitty on bills, 5th edition, 95, 98, 103, &c.

55. A person who indorses a bill as a surety, and is compelled to pay the amount to a *bonâ fide* indorsee, has an action over against the person, at whose request he became a party to the bill, notwithstanding he had notice that it was drawn upon an illegal consideration. *Seddons* v. *Stratford*, Peake, 215. Kenyon, C. J. 1794.

Acc. *Petrie* v. *Hannay*, 3 T. R. 418, 24. *Tennant* v. *Elliott*, 1 Bos. and Pul. 3.

Sed vide *Aubert* v. *Maze*, 2 Bos. and Pul. 371. *Webb* v. *Brooke*, 3 Taunt. 8.

56. In an action by the indorsee of a note against the maker, a fraudulent or illegal contract between the defendant and the payee, to which the plaintiff was not privy, is no defence. *Strongitharm* v. *Lukin*, 1 Esp. 389. Kenyon, C. J. 1795.

57. Nor can a smuggling consideration between the drawer and acceptor, be set up as a defence to an action, by the payee. *Potter* v. *Tubbs*, Esp. D. N. P. 57. Buller, J. Sarum, 1785.

58. A note given for compounding a *misdemeanor*, was held good. *Drage* v. *Ibberson*, 2 Esp. 643. Kenyon, C. J. 1798.

Cont. *Collins* v. *Blantern*, 2 Wils. 341. *Edgcombe* v. *Rodd*, 5 East, 294. S. C. 1 Smith, 515. *Beeley* v. *Wingfield*, 11 East, 46. And see ante, BANKRUPT, 181.

59. An excise officer, who, without previous authority, takes a promissory note for the amount of a penalty, which he was directed to levy on the defendant's goods, may maintain an action on the note. *Sugar* v. *Brinkworth*, 4 Campb. 46. Ellenborough, C. J. 1814.

60. A bill given for the amount of differences upon stock-jobbing transactions, is void in the hands of an indorsee, *with notice*. *Steers* v. *Lashley*, 1 Esp. 166. Kenyon, C. J. 1794.

And the court of K. B. discharged a rule for a new trial. *Ibid* and 6 T. R. 61.

62. Or if indorsed for value *after it is due*. *Brown* v. *Turner*, 2 Esp. 631. Kenyon, C. J. 1798.

And the court of K. B. refused a rule for a new trial. *Ibid.*

64. It is no objection to the validity of a bill, that it is accepted by the defendant for the amount of small quantities of spirits sold to him by the plaintiff, though the plaintiff is disabled by 24 Geo. 2. cap. 40. s. 12. from suing upon the original demand. *Spencer* v. *Smith*, 3 Campb. 9. Ellenborough, C. J. 1811.

65. A valid bill is indorsed by A. the payee, upon an usurious agreement to B. who indorses for a good consideration to C.—C. indorses to B.'s assignees in payment of a debt due to the estate. The assignees have a good title under C. *Parr* v. *Eliason et alt.* 3 Esp. 210. Kenyon, C. J. 1800.

And the court of K. B. discharged a rule for setting aside a nonsuit in trover against the assignees. *Ibid.* and 1 East, 92.

67. Where a note is not absolutely void, but merely voidable as issuing out of a contract, which is *malum prohibitum*, a subsequent note given in consideration of the abandonment of proceedings upon the former, is valid. *Witham* v. *Lee*, 4 Esp. 264. Ellenborough, C. J. 1803.

Sed vide *Aubert* v. *Maze*, 2 Bos. and Pul. 375. Sedgwick on Bla. Com. 54.

68. A. the *bonâ fide* holder of a bill, on which B. the payee, had forged the acceptance of C. gave it up to B. upon a statement of the circumstances, and received from him a bill accepted by D. without consideration. Held, that A. might recover against D. unless a bargaining to stifle a prosecution for the forgery, could be proved. *Wallace* v.

Hardacre, 1 Campb. 45. Ellenborough, C. J. 1807.

And see post, 73; ante, AGREEMENT B. BANKRUPT 181.

69. A note given by a British subject to a neutral, for goods purchased, while both parties are in the enemy's countries, may be sued on here. *Houriet and another* v. *Morris*, 3 Campb. 303. Ellenborough, C. J. 1812.

And see post, INSURANCE, B. (b)

70. A bill drawn in favour of an alien enemy, is a sufficient consideration for a promise made in time of peace, to pay principal and interest. *Dahammel, Administrator of La Tailleur*, v. *Pickering*, 2 Stark. 90. Ellenborough, C. J. 1817.

And see 34 Geo. III. chap. 9. sect. 2. *Antoine* v. *Morshead*, 6 Taunt. 237.

71. It is not an illegal consideration that a note was given by surety, for goods sold by assignee to his bankrupt. *Ranson* v. *Walker*, 1 Stark. 361. Ellenborough, C. J. 1816.

72. A bill accepted for a sum paid by plaintiff, as guarantee of payment in full, to one B., a creditor of defendant, to induce B. to join in a deed of composition, for 10*s*. in the pound, in favour of defendant, is bad. *Bryant* v. *Christie*, 1 Stark. 329. Ellenborough, C. J. 1816.

73. A bill given by a friend of a discharged insolvent, in compromise to a creditor, and for costs, with consent of plaintiff, that an indictment against the insolvent for fraud should be quashed, is valid, in the absence of evidence to shew the compounding of the prosecution to have been part of the agreement. *Harding and others* v. *Cooper*, 1 Stark. 467. Ellenborough, C. J. 1816.

B. (c) *Fraudulent.*

74. One of three persons who are engaged in a limited partnership, cannot bind the others by accepting a bill drawn upon the firm, for a debt due from himself individually. *Williams* v. *Thomas, Hunter, and Latham*, 6 Esp. 18. Ellenborough, C. J. 1806.

75. And such an acceptance being fraudulent in its inception, would not be available in the hands of a *bonâ fide* indorsee. *Ibid.*

Cont. *Ridley* v. *Taylor*, 13 East, 182.

B. (d) *When affected or extinguished by bill.*

76. Vendee of goods delivers to the vendor an order upon his bankers, directing them to give the vendor a bill upon London for the amount. The vendor takes the banker's draft, which is dishonoured. He cannot resort to the original demand for goods sold; as upon accepting the order it became incumbent on him to take care that he had good bills. *Bolton* v. *Reichard*, 1 Esp. 106. Kenyon, C. J. 1794.

And the court of K. B. gave judgment for the defendant upon a case reserved. 6 T. R. 139.

And see *Brown* v. *Kewley*, 2 Bos. and Pul. 518.

77. A party who has given a bill of exchange for the amount of a tradesman's bill, is estopped from disputing the reasonableness of the charges. *Knox* v. *Whalley*, 1 Esp. 159. Kenyon, C. J. 1794.

78. Where a note is indorsed in payment of a debt, the indorsee cannot sue upon the original cause of action, until the note is dishonoured. *Stedman* v. *Gooch*, 1 Esp. 4. Kenyon, C. J. 1793.

79. But if the maker has no effects in the hands of the party, at whose house the note purports to be payable, the holder may resort immediately to his original demand. *Ibid.*

80. Where a note is void for want of a stamp, the plaintiff may go into evidence of the consideration. *Wilson* v. *Kennedy*, 1 Esp. 245. Kenyon, C. J. 1794.

S. P. *Tyle* v. *Jones*, 1 East, 58. n.

And see *Puckford* v. *Maxwell*, 6 T. R. 52. *Alves* v. *Hodgson*, 7 T. R. 241. *White* v. *Wilson*, 2 Bos. and Pul. 118.

81. A cheque received for stock sold, is lost by the seller in his way home. The defendant, the purchaser, refuses to pay again for the stock unless he is indemnified against his liability on the cheque. Four months afterwards, the bankers on whom the cheque was drawn, become bankrupts, having sufficient money of the defendant's in their hands to answer it. The defendant proves the amount of the cheque under the commission. Held, that an action would not lie for the price of the stock. *Bevan* v.

Hill, 2 Campb. 381. Ellenborough, C. J. 1810.

82. An acceptor agrees to pay costs, renew the bill, and give a warrant of attorney. The bill is renewed, and the warrant of attorney is given, but the costs are not paid. The demand on the bill is not merged in the warrant of attorney, no judgment having been entered up. *Norris* v. *Aylett*, 2 Campb. 329. Ellenborough, C. J. 1809.

And see *Drake* v. *Mitchell*, 3 East, 251.

83. And a fresh action may be commenced on the first bill, though the second be outstanding. *Ibid.*

And see *Kearslake* v. *Morgan*, 5 T. R. 513.

C. TRANSFER.

C. (a) *How made.*

84. After a *blank* indorsement, the negotiability of the bill is not affected by the special indorsement of a subsequent holder. *Smith and others* v. *Clarke*, Peake, 225, and 1 Esp. 180. Kenyon, C. J. 1794.

And see *Peacock* v. *Rohdes*, Dougl. 611, 33.

85. A *blank* indorsement conveys a joint right of action to as many persons as agree in suing on the bill, without proof of any joint interest. *Ord and two others* v. *Portal*, 3 Campb. 239. Ellenborough, C. J. 1812.

Sed vide post, 89. As to blank indorsement in general, see APPENDIX, II.

86. The acceptor of a bill, who pays the amount under a forged indorsement, remains liable to the supposed indorser. *Smith and another, assignees of Bagnall and Sand*, v. *Shepperd*, Sel. Cases, 243. Lord Mansfield, C. J. 1776.

S. P. *Cheap* v. *Harley*, 3 T. R. 127.

87. Where the payee indorses a bill in blank, the next holder may convert the blank indorsement into a special indorsement, by inserting above it, the words "pay the contents to J. S." *Vincent and others* v. *Horlock and others*, 1 Campb. 442. Ellenborough, C. J. 1808.

S. P. *More* v. *Manning*, 1 Comyn's Rep. 311, 2; S. C. 4 Vin. Abr. Blanks, 7; *Edie* v. *East India Company*, 2 Bla. Rep. 295, 7; S. C. 2 Burr. 1216, 27.

And see *Snee* v. *Prescott*, 1 Atk. 249.

88. A bill was indorsed by the drawer, "Pay the contents to E. P., being part "of the consideration money in a certain "indenture of assignment, executed by "the said E. P. to R. R. R. and myself." The expression of the consideration of the indorsement is mere surplusage, and cannot restrain the negotiability of the bill. *Potts* v. *Read*, 6 Esp. 57. Ellenborough, C. J. 1806.

Acc. *Haussoulier* v. *Hartsink*, 7 T. R. 733.

Secus, where a condition is expressed in the indorsement. *Archer* v. *Bank of England*, Dougl. 437; *Robertson* v. *Kensington*, 4 Taunt. 30.

89. The delivery of a bill with a blank indorsement to a firm, consisting of two persons, in satisfaction of a debt due to an insolvent, to whom the two and a third person are trustees, does not, without indorsement to the three trustees, or some proof of delivery, give a right of action to the three. *Machell and others* v. *Kinnear*, 1 Stark. 499. Ellenborough, C. J. 1816.

Sed vide ante, 85.

C. (b) *By whom.*

90. Bankers may pledge bills deposited with them by a customer, though such customer be a creditor. *Collins* v. *Martin et alt.* 2 Esp. 520. Eyre, C. J. 1796.

And the court of C. P. discharged a rule to set aside nonsuit. *Ibid.* and 1 Bos. and Pul. 648.

S. P. per Eyre, C. J. in *Bolton* v. *Puller*, 1 Bos. and Pul. 546.

92. In an action by an indorsee against acceptor, an act of bankruptcy committed by the payee before indorsement, is a good defence upon the general issue. *Pinkerton* v. *Adams and Milner*, 2 Esp. 611. Kenyon, C. J. 1799.

S. P. admit: *Arden* v. *Watkins*, 3 East, 322, 3.

93. A bill payable to the order of the drawer, and accepted for his accommodation, does not pass to his assignees. Therefore an indorsement for value, after an act of bankruptcy, gives a right of action. *Wallace* v. *Hardacre*, 1 Campb. 46, 179. Ellenborough, C. J. 1808.

S. P. *Arden* v. *Watkins*, 3 East, 321; *Willis* v. *Freeman*, 12 East, 656.

94. A. indorses a bill to B., to enable him to get it discounted by C. for a particular purpose. Cannot retain the bill for a debt due to him from B. *Delauney* v. *Mitchell*, 1 Stark. 439. Ellenborough, C. J. 1816.

95. Bill was delivered by defendant to two partners, bankers, and transferred to plaintiffs by one of them after bankruptcy of the other, and doubted whether they can recover? *Ramsbottom* v. *Cator*, 1 Stark. 228. Ellenborough, C. J. 1816.

C. (c) *At what time.*

96. A bill being in the hands of the drawer's banker, he settles with the acceptor, and gives a receipt in full; he cannot, afterwards, by indorsing the bill, give a title against the acceptor. *Thorogood* v. *Clarke*, 2 Stark. 251. Ellenborough, C. J. 1817.

97. If the payee of a note, after having received part of the amount from the maker, indorse it over for value without notice, the indorsee is not bound by such payment. *Cooper* v. *Davies*, 1 Esp. 463. Kenyon, C. J. Hereford, 1795.

98. Where a bill is accepted on an illegal transaction, (lottery insurance) the acceptor is not entitled to call upon a remote indorsee, to shew that he gave value for the bill, unless he became a holder after the bill was due. *Wyatt* v. *Bulmer*, 2 Esp. 538. Eyre, C. J. 1797.

99. The payee of an accommodation note, cannot give a right of action against the maker, by indorsing for a valuable consideration after it is due. *Tinson* v. *Francis*, 1 Campb. 19. Ellenborough, C. J. 1807.

Cont. *Charles* v. *Marsden*, 1 Taunt. 224.

100. Where a bill accepted on a smuggling transaction, is indorsed for a valuable consideration before it becomes due, the indorsee may indorse over after the bill is due. *Chalmers and others* v. *Lanion*, 1 Campb. 383. Ellenborough, C. J. and K. B. 1808.

101. A person who takes a bankers' chequue nine months after the day on which it bears date, does not, from that circumstance, hold it subject to the same equities, with which it was charged in the hands of the party from whom he received it, provided the transfer was made upon a valuable consideration, and without notice of any defect of title. *Boehm and others* v. *Sterling and others*, 2 Esp. 575. Kenyon, C. J. 1797.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 7. T. R. 423.

And see *Morris* v. *Lee*, Bayl. 233. *Charles* v. *Marsden*, 1 Taunt. 224. *Grant* v. *Vaughan*, 3 Burr. 1516.

103. A promissory note paid and re-issued before it becomes due, is available in the hands of a *bonâ fide* indorsee, without notice. *Burbidge* v. *Manners*, 3 Campb. 194. Ellenborough, C. J. 1812.

104. Secus, where it is re-issued after payment *at maturity*. *Ibid.*

And see *Beck* v. *Robley*, 1 H. B. 89, n. Bayley, 66.

105. In an action on a special acceptance at a banker's, presentment at the banker's after banking hours, but "no orders" given for answer, was held a sufficient presentment, *Garnett* v. *Woodcock*, 1 Stark. 475. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

106. *Aliter*, if the bank had been shut. *Ibid.*

D. Acceptance.

D. (a) *What shall be.*

107. A bill of exchange good in the commencement was, before the late statute, vitiated by usury, committed upon the making of an indorsement; through which the plaintiffs necessarily claimed. *Lowes* v. *Mazzaredo and others*, 1 Stark. 385. Ellenborough, C. J. 1816.

And the court set aside a nominal verdict for the plaintiffs. *Ibid.*

109. "There is your bill, it is all right." This is no acceptance. *Powell* v. *Jones*, 1 Esp. 17. Kenyon, C. J. 1793.

Sed vide *Peach* v. *Kay*, Bayley, 78.

110. A promise to accept a bill before it is drawn, can only be insisted on as an acceptance, by a person to whom the promise was communicated, and who took the bill on the credit of it. *Miln* v. *Prest*, 4 Campb. 393. Gibbs, C. J. 1816.

111. The drawee of the bill, on account of a cargo consigned to him says, "it will not be accepted until the ship with the wheat arrives;" upon arrival this is an acceptance. *Miln* v. *Prest*, 4 Campb. 393. Gibbs, C. J. 1816.

112. An answer *at the house* of the acceptor, "that the bill will be paid," does not dispense with the necessity of proving his signature, unless it be shewn that the answer was made by his authority. *Sayer* v. *Kitchen*, 1 Esp. 209. Kenyon, C. J. 1794.

112. If the drawee acknowledge that the acceptance is in his hand writing, he cannot afterwards set up as a defence, that it is a forgery. *Leach* v. *Buchanan*, 4 Esp. 227. Ellenborough, C. J. 1813.

S. P. dub. *Cooper* v. *Le Blanc*, 2 Strange, 1051.

113. Or, if he have paid other bills, to which his acceptance was forged by the same party. *Barber* v. *Gingell*, 3 Esp. 60. Kenyon, C. J. 1799.

And see *Gibson* v. *Hunter*, *in error*, 2 H. Bla. 288. post I. (d.)

114. The payee of a bill sends it by post to the drawee, requesting him to accept it and to hand it over to an agent, according to the course of dealing between the parties. The drawee retains the bill beyond the usual time. This amounts to an acceptance. *Harvey* v. *Martin*, 1 Campb. 425. Ellenborough, C. J. 1806.

S. C. Bayley, 81, n. S. P. *Trimmer* v. *Oddie*. *Ibid*. 88, and Chitty on Bills, 242, n. 2.

115. But, by the usage of London, a banker's cheque coming through another banking house, may be retained by the drawee till five o'clock in the afternoon of the day it is presented for payment, and then returned at the clearing house. *Fernandey* v. *Glynn*, 1 Campb. 426, n. Ellenborough, C. J. 1806.

And see *Turner* v. *Mead*, 1 Strange, 415, 416. *Howard* v. *Bank of England*, *ibid*. 550.

116. A promise to accept a non-existing bill, does not amount to an acceptance, except with respect to a party, who is thereby induced to take it. *Miln* v. *Prest and another*, Holt, 181. Gibbs, C. J. 1816.

117. A conditional verbal acceptance binds the drawee as soon as the condition is satisfied. *Ibid*.

118. Where the drawee says to the holder, "If you will send the bill to our counting-house, I will give directions for its being accepted," no action will lie upon such conditional promise, without shewing that the bill has been sent accordingly. *Anderson* v. *Hick and others*, 3 Campb. 179. Ellenborough, C. J. 1812.

119. And where the acceptance is conditional, the plaintiff cannot declare upon a general acceptance, though the condition has been complied with. *Langston and others* v. *Corney and others*, 4 Campb. 176. Gibbs, C. J. 1815.

And see *Wynne* v. *Raikes*, 5 East, 514. S. C. 2 Smith, 98. *Powell* v. *Monnier*, 1 Atk. 611.

120. There cannot be two distinct acceptances of the same bill. *Jackson* v. *Hudson*, 2 Campb. 447. Ellenborough, C. J. 1810.

N. But in the case of an acceptance, *supra protest*, there may be a similar acceptance for the honour of another party. Beawes' L. M. 422.

121. Where, therefore, a bill is drawn upon A. in pursuance of an agreement by which B. had undertaken to guarantee to the drawer the payment of A.'s debt; and after the bill is accepted by A., B. writes an acceptance by himself; B. is not liable as acceptor, it is a collateral undertaking for the debt of A., which must be specially declared on. *Ibid*.

N. Qu. whether B. is liable in any shape, as no consideration appears on the face of the instrument. *Wain* v. *Warlters*, 5 East, 10, and such an undertaking seems not to be within the custom of merchants, as received in this country; vide *Pothier, Traité du Contrat de Change*, part 1, chap. 3. num. 50.

122. Detention of bill by drawee, for an unreasonable time, amounts to an acceptance, or at least to an undertaking to accept. *Mason* v. *Barff*, Chitty on Bills, 228. Ellenborough, C. J. 1817.

D. (b) *Special Acceptance*.

Post E (b).

123. The holder of a bill may refuse

a special acceptance, in which the mode of payment differs *in form* from that required by the bill, in an action against the drawer. *Boehm* v. *Garcias and others*, 1 Campb. 425. Ellenborough, C. J. 1806.

And see *Da Costa* v. *Cole*, Skinn. 272.

124. And upon a protest for non-acceptance, no evidence will be admitted to shew that payment in the mode proposed by the drawee, would have been *equivalent* to a payment in the terms of the bill. *Ibid.*

125. But it has been held, that where a bill is accepted, *payable at a particular place*, the special acceptance forms no part of the contract, and need not be noticed in the declaration; it being inserted merely for the purpose of apprising the holder where he *may* apply for payment, not as a condition restricting the general liability of the acceptor. *Lyon* v. *Sundius and Sheriff*, 1 Campb. 423. Ellenborough, C. J. 1808.

126. S. P. said to have been ruled in K. B. by the whole court. *Ibid.*

127. S. P. *Head and another* v. *Sewell*, Holt, 363. Gibbs, C. J. 1816.

128. S. P. *Macbride* v. *Woodruffe*, 2 Stark. 253. Ellenborough, C. J. 1817.

129. So a promissory note purporting to be payable at a particular place, need not, to charge the maker, be presented there. *Wild* v. *Rennard*. 1 Campb. 425. Bailey, J. 1809.

130. Though the place be inserted in the body of the note. *Nicholls* v. *Bowes*, 2 Campb. 498. Ellenborough, C. J. 1810.

S. P. cont. *Sanderson* v. *Bowes*, Bayley, 96, 185. S. C. 14 East, 500.

And see *Dickinson* v. *Bowes*, 16 East, 110; *Howe* v. *Bowes*, *ibid.* 112. S. C. in error, 3 Taunt. 399, n.* 5 Taunt. 30. 344.

131. But upon a case reserved by Sir James Mansfield, C. J. where the defendant had accepted a bill payable at a particular place, it was held, that it must be presented there for payment to charge the acceptor. *Callaghan* v. *Aylett*, 2 Campb. 549, C. P. H. T. 1811. S. C. 3 Taunt. 397.

132. In a late case in K. B. a declaration upon a bill accepted by the defendant, payable at C. S. S. and Co.'s without averring any presentment for payment, was held good upon special demurrer. *Fenton* v. *Goundry*, 2 Campb. 656. K. B. E. T. 1811. and S. C. 13 East, 459.

And see *Russell* v. *Exon*, 4 M. and S. 505. Bayley, 185, n. (7)

133. But where a bill is drawn on the defendant "payable in London," it must be shewn that it was presented at the place indicated by the acceptance. *Hodge* v. *Fillis*, 3 Campb. 463. Ellenborough, C. J. 1813.

134. But a subsequent promise of payment dispenses with such evidence. *Ibid.*

135. An action at law cannot be maintained against the acceptor of a bill lost after indorsement, but which does not appear to have been destroyed, although a bond of indemnity have been tendered; nor can the plaintiff recover upon the original consideration. *Pierson* v. *Hutchinson*, 2 Campb. 211, 6 Esp. 126. Ellenborough, C. J. 1809.

136. Nor if one half of a note be produced. *Mayor and others* v. *Johnson and Eaton*, 3 Campb. 324. Ellenborough, C. J. 1813.

N. This was the case of a country bank note; and the part produced contained the defendant's signature. If, as is usually the case, the note in question only bore one signature originally, the the lost half would be waste paper. But this point seems not to have been raised.

137. But where a bill, *specially* indorsed to the plaintiffs by the payee, and by them not indorsed over, was lost after acceptance, it was held, that the plaintiffs were entitled to recover. *Long and others* v. *Baillie*, 2 Campb. 214, n. Ellenborough, C. J. 1805.

N. For the loser's remedy in equity, see *Walmsly* v. *Child*, 1 Vez. 341. *Ex parte Greenway*, 6 Ves. 812; *Mossop* v. *Eadon*, 16 Ves. 430; Pothier, Traité du Contrat de Change, part 1. chap. 5. num. 130, 1, 2.

138. The *date* of the acceptance of a bill payable after sight, need not be in the hand-writing of the acceptor. *Glossop* v. *Jacob*, 4 Campb. 227. 1 Stark. 69. Ellenborough, C. J. 1815.

139. Acceptor of accommodation bills may reclaim them in the hands of the indorsee of payee, for whose accommodation they were drawn, if, when they

fall due, the balance between payee and indorsee, to whom they have been remitted on account, be in favour of payee, if not reclaimed, the lien of indorsee for subsequent advances revives. *Atwood and another* v. *Crowdie and another*, 1 Stark. 483. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

D. (c) *How cancelled.*

134. A drawee by putting his name on the bill, makes himself irrevocably liable; and if the acceptance be legible, though cancelled, he is liable as acceptor. *Thornton and another* v. *Dick and another*, 4 Esp. 270. Ellenborough, C. J. 1803.

S. P. *Tummer, or Trimmer,* v. *Oddie,* per Lord Kenyon, Bayley, 88.

Sed vide Chitty, 204, n. 9. *Bentinck* v. *Dorrien*, 6 East, 199. S. C. 2 Smith, 337. *Paton* v. *Winter*, 1 Taunt. 420, 3. Bayl. 88, 9, and authorities there cited.

135. But if the writing on the bill be not legible, it seems doubtful whether the plaintiff should declare, as upon an accepted or a defaced bill. *Ibid.*

And see *Tummer*, v. *Oddie*, Bayley, 88. post, I. (e).

136. Where a banker's clerk cancels a cheque, and afterwards writes under it "*Cancelled by mistake*," the banker may return the cheque unpaid. *Fernandey* v. *Glynn*, 1 Campb. 426, n. Ellenborough, C. J. 1806.

Raper v. *Birkbeck*, 15 East, 17, 9, acc.

D. (d) *Acceptor of bill and maker of note, how far liable.*

*137. Acceptor of bill payable in England, is only liable to the extent of the sum specified in the bill, with 5 per cent. interest. He is not chargeable with re-exchange, foreign interest, or expenses. *Woolsey* v. *Crawford*, 2 Campb. 445. Ellenborough, C. J. 1810.

N. According to Pothier, the drawee, by accepting, accedes to all the obligations of the drawer; and he expressly enumerates interest, expenses, and re-exchange; Traité du Contrat de Change, part 1. chap. 4. art. 6. num. 117. But in *Napier* v. *Shneider*, 12 East, 420, the court refused to refer it to the master to compute what was due from the acceptor for re-exchange, &c. *as he could not try foreign customs.* See also Code de Commerce, Liv. 1, Tit. 8, sect. 1, § 3.

138. Upon a note payable immediately, in case of the non-payment of instalments, interest upon the whole sum is due from the time of failure, not merely upon the accruing instalments. *Blake, executor of Dale,* v. *Lawrence*, 4 Esp. 147. Ellenborough, C. J. 1802.

139. A tender of money due on a promissory note, although accompanied with a request to have the note delivered up, is sufficient to stop the running interest. *Dent* v. *Dunn, executrix, &c.* 3 Campb. 296. Ellenborough, C. J. 1812.

140. In an action on a foreign note, payable in the currency of the country, the verdict was regulated by the course of exchange *at the time of action brought. Houriet and another* v. *Morris*, 3 Campb. 303. Ellenborough, C. J. 1812.

N. But see *Pollard* v. *Herries*, 3 Bos. and Pul. 335. where it was ruled, that the calculation should be made from the state of the exchange *at the time of the demand of payment.* And see *Mellish* v. *Simeon*, 2 H. Bla. 378.

D. (e) *Where discharged.*

141. The holder may resort to the acceptor after taking security from the drawer, or discharging him out of execution. *Smith* v. *Knox*, 3 Esp. 46. Eldon, C. J. 1799.

Ex parte Smith, 3 Bro. Ch. Ca. 1. *Ex parte Wilson*, 11 Ves. 410.

And see *Hayling* v. *Mulhall*, 2 Bla. 1235; *English* v. *Darley*, 2 Bos. and Pul. 62. Vinn. Sel. Jur. Quæst. lib. 2. cap. 42. passim.

142. Or after suffering three months to elapse without demanding payment from the acceptor, during which period the drawer becomes insolvent. *Anderson* v. *Cleland*, Esp. D. N. P. 58. Lord Mansfield, C. J. 1779.

Vide post, 155.

143. A. makes a promissory note in favour of B. for the accommodation of

G.

the latter. The note is indorsed to C. with notice of the want of consideration; B. becoming insolvent, C. accepts a dividend, and covenants not to sue him. Held, that C. may still sue A., though in the event of his recovering the amount from A., B. will again become liable to be sued through the act of C. *Mallett* v. *Thompson*, 5 Esp. 178. Ellenborough, C. J. 1804.

Cont. for the above reason, Pothier, Traité du Contrat de Change, part. I. chap. 6. num. 180.

144. It has however been held, that if indorsee of bill, with notice of its being accepted without consideration, receive part from drawer, and give him time for the payment of the residue, the acceptor, who, under such circumstances is a mere surety, is discharged. *Laxton* v. *Peat*, 2 Campb. 185. Ellenborough, C. J. 1809.

And see Pothier, Traité du Contrat de Change, part. I. chap. 6. num. 177, 8.

145. *E contra*, by giving time to the accommodation acceptor, he does not discharge the drawer. *Collott and others* v. *Haigh*, 3 Campb. 281. Ellenborough, C. J. 1812.

146. But in a subsequent case it was held, that the indulgence to the drawer, where payment has regularly been demanded from the acceptor, will not discharge the latter; and *Laxton* v. *Peat* was doubted. *Kerrison* v. *Cooke*, 3 Campb. 362. Gibbs, J. 1813.

N. The court of C. P. have since held that nothing but payment or a release will discharge the acceptor. *Fentum* v. *Pocock*, 5 Taunt. 193.

147. An acceptor cannot avail himself of a renuntiation of the holder's claim upon him, unless it be express and for consideration. *Parker* v. *Leigh*, 2 Stark. 228. Ellenborough, C. J. 1817.

148. Where an accommodation bill is accepted for a particular purpose, the holder, after notice that this purpose is satisfied, cannot apply it to a different object. *Cartwright* v. *Williams*, Chitty on Bills, 241. Sitt. at Guildhall after H. T. 1818.

Acc. post, I. (a) 287.

149. In a parol discharge of an acceptance, the language employed must amount to an unconditional renuntiation of the holder's claim. *Whatley and others*, v. *Tricker and others*, 1 Campb. 35. Ellenborough, C. J. 1807.

Acc. *Dingwall* v. *Dunster*, Doug. 235, 47.

150. The holder of a bill which is overdue, gives in a blank schedule under an insolvent act. This does not amount to an acknowledgment that the bill has been satisfied, so as to discharge the acceptor. *Hart* v. *Sarah Newman*, 3 Campb. 13. Ellenborough, C. J. 1811.

151. Acceptor of a bill drawn to the order of a fictitious payee, cannot be sued by an indorsee, unless the acceptor were a party to the fraud, or had received the value. *Bennett* v. *Farnell*, 1 Campb. 130, 80, c. Ellenborough, C. J. 1807, and K. B. 1808.

And see *ex parte Allen*, Co. B. L. 184, 5.

152. In an action on a note, the defendant cannot set up a verbal agreement entered into at the time the note was made, whereby the plaintiff undertook to accept a renewal of the note, in lieu of payment at maturity. *Hoare and others*, v. *Graham and another*, 3 Campb. 57. Ellenborough, C. J. 1811.

153. The party who accepts a bill payable at his banker's, is not discharged, by the neglect of the holder to present the bill for several months after it falls due, and the intervening bankruptcy of the banker; bankers having funds of the acceptor's in their hands. *Sebag* v. *Abitbol*, 1 Stark. 79. Ellenborough, C. J. 1815.

And the court of K. B. set aside a nominal verdict for the plaintiff. *Ibid.*

154. A party taking a bill from the drawer with knowledge of its being an accommodation bill, can only recover from the acceptor the balance really due to himself from his indorser. *Jones and others*, v. *Hibbert*, 2 Stark. 304. Bayley, J. 1817.

155. In an action against acceptor, it is no defence that the bill was indorsed over by plaintiffs to A., who had held it three months after due, and had received another bill from drawer, for the purpose of taking it up. *Buzzard* v. *Flecknoe*, 1 Stark. 333. Ellenborough, C. J. 1816.

Vide ante, 142.

E. PRESENTMENT FOR PAYMENT.

E. (a) *When necessary.*

156. Before a bill becomes due, the holder is informed by the drawees that they have no effects in hand. On the day, the drawer tells the holder he will endeavour to provide effects, and will see him again. The bill must be presented to the drawees. *Prideaux* v. *Collier*, 2 Stark. 57. Ellenborough, C. J. 1817.

E. (b) *At what time.*

157. Three days' grace are allowed on promissory notes. *Smith* v. *Kendal*, *executor*, 1 Esp. 231. Kenyon, C. J. 1794.

S. P. acc. *Brown* v. *Harraden*, 4 T. R. 148. S. P. cont. *Dexlaux* v. *Hood*, Bull. N. P. 74. S. P. dub. *Ward* v. *Honeywood*, Dougl. 61.

158. Although not made payable to *order* or to *bearer*. *Ibid.*

And the court of K. B. set aside a nominal verdict for the defendant. *Ibid.* and 6 T. R. 123.

159. A demand of payment on the second day of grace, is a mere nullity. *Wiffen* v. *Roberts*, 1 Esp. 261. Kenyon, C. J. 1795.

In France, by the Code de Commerce, all days of grace are abolished; liv. 1, tit. 8, s. 5, num. 135.

160. The holder of a bill accepted, payable at a banking house, is bound to present it within banking hours. *Parker* v. *Gordon*, [illegible] Esp. 41. Ellenborough, C. J. 180[illegible].

And the court of K. B. refused a rule to set aside nonsuit; 7 East, 385.

S. P. admit. *Jameson* v. *Swinton*, 2 Taunt. 224. And see *Elford* v. *Teed*, 1 M. and S. 28.

161. But six in the evening is not an unseasonable hour to apply at the house of a merchant or tradesman for payment of an accepted bill. *Morgan* v. *Davison*, 1 Stark. 114. Ellenborough, C. J. 1815.

162. Or eight in the evening. *Barclay* v. *Bailey*, 2 Campb. 527. Ellenborough, C. J. 1811.

163. A check received on one day should be presented for payment on the next, this being a reasonable time according to the law merchant, which is neither to be strengthened nor controlled by the practice prevailing amongst the bankers, on the west side of St. Paul's, to present cheques for payment on the day after they are brought by the general post, or the practice on the east side of St. Paul's, to present such cheques on the day they are received. *Rickford and others* v. *Ridge*, 2 Campb. 537. Ellenborough, C. J. 1810.

164. But the holder has the whole of that day to make the presentment. *Pocklington* v. *Silvester*, Chitty on Bills, 351. Gibbs, C. J. 1817.

And the court of C. P. set aside a verdict for the defendant, found contrary to the chief justice's direction. *Ibid.*

And see *Robson* v. *Bennett*, 2 Taunt. 388.

165. The holder of a banker's cheque is bound to forward it for payment by the post of the day following that on which he receives it. Sending it by a private conveyance, which arrived an hour later than the post, is not sufficient, although the bank never opened on that day. *Beeching and others*, v. *Gower*, Holt, 313. Gibbs, C. J. 1816.

166. The usage of the excise to allow an acceptor six days beyond the three days grace, if requested, on bills drawn specifically for the king's money, on payment of one shilling to the clerk for his trouble, is a general custom engrafted on such bills, binding on the parties. *Welford* v. *Hankin*, Esp. D. N. P. 71. Lord Mansfield, C. J. 1763.

E. (b) *At what place.*

And see ante A. (c) 33, 34 D. (b)—post, G. (b) 238.

167. Presentment of a bill made payable at a banking-house to the banker's clerk at the clearing house is sufficient. *Reynolds* v. *Chettle*, 2 Campb. 596. Ellenborough, C. J. 1811.

S. P. *Robson* v. *Bennett*, 2 Taunt. 388. Acc. *Dickenson* v. *Bowes*, 16 East, 110; *Howe* v. *Bowes*, *ibid.* 112.

168. A place of payment written at the foot or margin of a note,

is not, in an action against the maker, to be considered as part of the contract. *Price v. Mitchell*, 4 Campb. 200. Gibbs, C. J. 1815.

169. But where the place of payment is *printed* at the foot of the note, special presentment must be proved. *Trecothick v. Edwin*, 1 Stark. 468. Ellenborough, C. J. 1816.

170. If a country banker's note purport to be payable in the country and in town, a country holder, residing in the neighbourhood, is not guilty of laches, if he present it for payment in town only. *Beeching and others v. Gower*, Holt, 313. Gibbs, C. J. 1816.

171. The indorser of a bill payable after sight, is not discharged by the circumstance of the bill remaining a long time in circulation, before it is presented for acceptance. *Goupy and others v. Harden and others*, Holt, 342. Gibbs, C. J. 1816.

172. Where the place of payment is stated in the body of the note, such statement is material, and the omission of it in the declaration is not cured by an averment that the note was *duly* presented. *Roche v. Campbell*, 3 Campb. 247. Ellenborough, C. J. 1812.

F. Protest.

173. It is not necessary to send a copy of the protest with the notice of non-payment. *Cromwell et alt. v. Hynson*, 2 Esp. 511. Kenyon, C. J. 1796.

Acc. Pothier, Traité du Contrat de Change, part I. chap. 5. s. 150.

Cont. *Goostrey v. Mead*, Gilb. Evid. 79. S. C. B. N. P. 271, 2.

174. Or to give notice that a protest has been made. *Robins v. Gibson*, 3 Campb. 334. Ellenborough, C. J. 1813.

And the court of K. B. refused a rule for a new trial. *Ibid* and 1 M. and S. 288. *Ibid.* Ellenborough, C. J.

And see Selw. N. P. 325, n.

175. And *semble*, that the protest may be drawn up at any time before the trial, provided the bill be noted on the day it is dishonoured. *Chaters v. Bell et alt.* 4 Esp. 49. Kenyon, C. J. 1801.

176. S. P. upon a second trial before Ellenborough, C. J. *Ibid.*

But a case reserved on this point was, after argument, directed to be turned into a special verdict; 1 Law Journal, 315, K. B. E. T. 1803. Which never came before the court, Selw. 327.

177. A bill protested for non-acceptance, need not be protested for non-payment. *Price v. Dardell*, Chitty on Bills, 314. Kenyon, C. J. 1794, and *De la Torre v. Barclay*, 1 Stark. 7. Ellenborough, C. J. 1814.

Contra, Pothier, Traité du Contrat de Change, num. 138. And see *Orr v. Maginnis*, 7 East, 359, 361.

178. To entitle the holder of an inland bill to *interest* and *costs*, a protest must be proved. *Boulager v. Talleyrand*, 2 Esp. 550. Kenyon, C. J. 1797.

S. P. *Harris v. Benson*, 2 Stra. 910.

179. S. P. Contra, *Windle v. Andrews*, 2 Stark. 425. Abbott, C. J. 1818.

180. But the want of such a protest does not affect the right to recover the *principal*. *Ibid.*

S. P. *Brough v. Parkings*, 2 Lord Raymond, 992. S. C. 1 Salk. 131. S. C. 6 Mod. 80. Cont. as to Coal Notes, 3 Geo. 2. cap. 26. s. 7.

181. An express promise of payment by the drawer of a foreign bill, which has been dishonoured, is equivalent to an admission that a protest has been regularly made, in an action against the sheriff for not arresting the drawer on mesne process sued out by the holder. *Gibbon v. Coggon, sheriff of Essex*, 2 Campb. 188. Ellenborough. C. J. 1809.

182. And such a promise will support an allegation of due presentment to the drawees, protest, and notice to the defendants. *Greenway and others, v. Hindley*, sued with Gregorie, outlawed. 4 Campb. 52. Ellenborough, C. J. 1814.

183. A protest for non-acceptance and non-payment of a foreign bill of exchange, is not necessary to charge the drawer, where it is proved by the drawee, that there were no effects in hand; though it appear from a claim which the drawer would have had upon the drawee as executor, if the latter had possessed assets, that the former was not altogether unwarranted in expecting that the bill would be accepted. *Legge v. Thorpe*, 2 Campb. 310. Ellenborough, C. J. 1810.

And the court of K. B. discharged a

rule for a new trial. *Ibid.* and 12 East, 471.

And see 12 East, 177.

G. Notice of dishonor.

G. (a) *How given.*

184. Notice of the dishonor of a bill may be given by letter. *Langdon* v. *Hulls*, 5 Esp. 157. Ellenborough. C. J. 1804.

185. But in such case a copy of the letter cannot be given in evidence, without notice to produce the original. *Ibid.*

186. Parol evidence of the contents of a letter announcing the dishonor of a bill, is not admissible without notice to produce the letter. *Shaw and others* v. *Markham, clerk*, Peake, 165. Kenyon, C. 1792.

187. But it has since been held, that notice need not be given to produce the letter containing notice of dishonor. *Roberts* v. *Bradshaw*, 1 Stark. 28. Ellenborough, C. J. 1815.

And see ante, Attorney, B, (a) 17.

188. Proof that duplicate notices were written, and also, that *a letter* was sent to the defendant on the same day, will, upon the non-production of the letter after notice, be evidence of notice of dishonor, without shewing the contents of the letter, or otherwise connecting it with the notices. *Ibid.*

And the court refused a rule for a new trial. *Ibid.*

189. Proof that a letter containing notice, was delivered to a person at the house in which the defendant lodged, and that the same letter was, on the next morning, thrown into the plaintiff's house, is presumptive evidence of notice to the defendant. *Stedman* v. *Gooch*, 1 Esp. 4, 5. Kenyon, C. J. 1793.

190. It is not sufficient to shew that it was written by a merchant in his counting-house, and put down upon a table for the purpose of being carried from thence to the post-office, and that, by the course of business in the counting-house, all letters deposited on this table are carried to the post-office by a porter. *Hetherington* v. *Kemp*, 4 Campb. 193. Ellenborough, C. J. 1815.

191. But if the porter is called, and swears he has put in all letters which he found from time to time on the table, it is sufficient. *Ibid.*

192. Or if a letter of the defendant's is produced, wherein he acknowledges the receipt of a letter from the plaintiff, of the same date, though without referring to the contents. *Ibid.*

193. Where a bill is drawn in Jamaica, in favour of A., who remains there after the bill is dishonoured, notice left at A.'s residence in England is sufficient. *Cromwell et alt.* v. *Hynson*, 2 Esp. 511. Kenyon, C. J. 1796.

194. To give notice of the dishonor of a foreign bill, it is sufficient to put a letter of advice in the post-office here, notwithstanding the irregularity of the foreign post. *Kufh and others* v. *Weston and others*, 3 Esp. 54. Kenyon, C. J. 1799.

And see *Saunderson* v. *Judge*, 2 H. Bla. 509, 11; *Darbishire* v. *Parker*, 6 East, 3, 9. S. C. 2 Smith, 195; *Parker* v. *Gordon*, 7 East, 385. S. C. 3 Smith, 358.

But see *Pearson* v. *Crallan*, 2 Smith, 404; *Pothier, Traité du Contrat de Change*, part 1, chap. 5, sect. 2, art. 1, § 4.

195. A bill was presented for payment on the 4th, by a notary, on behalf of the payee's bankers. The notary brought the bill back to the bankers dishonored, on the morning of the 5th. On the same day it was returned to the payees, who, *in the course of the sixth*, sent a letter to the drawer by the twopenny post; all the parties residing within the delivery. Held, that this was sufficient notice. *Scott and others* v. *Lifford*, 1 Campb. 246. Ellenborough, C. J. 1808.

Rule nisi for a new trial, on the ground that the notice was too late, and that it was sent by an improper conveyance, refused in K. B. *Ibid.* and 9 East, 347.

196. In the last case, it did not appear in evidence at what *hour* of the day the letter was put into the office; but it has since been held, that a party being bound to give notice of the dishonor of a bill on the day after that on which it reaches him, it is not sufficient to put a letter into the twopenny post after *five* in the afternoon; as, by the course of the post,

such letters will not be delivered till the next morning. *Smith* v. *Mullett*, 2 Campb. 208. Ellenborough, C. J. 1811.

And see Bayley, 125.

197. To entitle a person to avail himself of the twopenny post in sending notice, it is not necessary that the parties should reside at remote points within the delivery. *Hilton* v. *Fairclough*, 2 Campb. 633. Lawrence, C. J. 1811.

198. It is sufficient if the letter be put into the office early enough to reach its destination on the evening of the day following that on which the bill was dishonored, though the parties reside within a short distance from each other. *Ibid.*

199. Notice of dishonor must be given by or on the behalf of the holder; it is not sufficient that the defendant has been informed of the non-payment of the bill by an unauthorized stranger. *Stewart* v. *Kennett*, 2 Campb. 177. Ellenborough, C. J. 1809.

But see Insurance, O. (a) 1.

200. But notice from any person who is a party to the bill is sufficient. *Wilson* v. *Swabey*, 1 Stark. 34. Ellenborough, C. J. 1815.

201. Notice from the acceptor is sufficient. *Rosher and another* v. *Kieran*, 4 Campb. 87. Ellenborough, C. J. 1814.

202. It is not sufficient that the party sought to be charged, has received notice of the dishonor of a bill as many days as there are subsequent indorsees, unless it be shewn that each gave notice within a day after he received it. *Marsh* v. *Maxwell*, 2 Campb. 210. Ellenborough, C. J. 1811.

203. S. P. contra. *Cutler and another* v. *Boddy*, Chitty on Bills, 406. Ellenborough, C. J. 1814.

204. A special case appears to have been afterwards reserved on this point. *Turner* v. *Leach*. *Ibid.*

And see *M'Queen* v. *Farquhar*, 11 Ves. 478.

205. Notice sent by a private hand on the 25th, being the day after it reached the party, is sufficient, although the mail set out early in the morning of the 25th. *Bancroft* v. *Hall*, Holt, 476. Bayley, J. Lancaster, 1816.

206. Notice may be given at a counting-house between 6 and 7 in the evening. *Ibid.*

207. If the drawer or indorser of a bill, receive due notice of dishonour from his immediate indorsee, he is liable to a subsequent indorsee from whom he had no direct notice. *Jameson and others* v. *Swinton*, 2 Campb. 373. Lawrence, J. 1809.

S. C. not S. P. 2 Taunt. 224. S. P. acc. *Shaw* v. *Croft*, Chitty, 239. S. P. cont. *ex parte Barclay*, 7 Ves. 598.

208. A remote indorsee of a dishonoured cheque, is not bound to apply for payment to the drawer, or to give him notice of the dishonour; for the purpose of charging an intermediate party, it is sufficient to give notice to such party. *Rickford and others* v. *Ridge*, 2 Campb. 537. Ellenborough, C. J. 1810.

Vide post G. (c) 239, note.

209. Notice of the dishonour of a bill, is sent to an indorsee of the Jewish persuasion on the 8th of October, the greatest Jewish festival in the year. Notice from him to the indorser, by letter put into the general post office on the 9th, was sufficient. *Lindo* v. *Unsworth*, 2 Campb. 602. Ellenborough, C. J. 1811.

210. Absence from home, occasioned by the dangerous illness of the party's wife, was ruled to be no excuse for not forwarding a notice which had been sent to him. *Turner* v. *Leach*, Chitty on Bills, 275. Ellenborough, C. J. 1818.

Vide tamen, *Hilton* v. *Shepherd*, 6 East, 15.

211. Notice of dishonour may be given immediately, upon the refusal of the payment, by the maker of a note, without waiting to see whether it will be taken up in the course of the day. *Burbridge* v. *Manners*, 3 Campb. 193. Ellenborough, C. J. 1812.

212. The notice need not state the liability of the party to whom it is given. *Shaw* v. *Croft*, Chitty on Bills, 284. Kenyon, C. J. 1798.

G. (b) *When necessary.*

213. The payee of a *note*, who has no effects in the hands of the *maker*, is not entitled to notice. *Corney* v. *Mendez da Costa*, 1 Esp. 302. Buller, J. 1795.

S. P. *De Bert* v. *Atkinson*, 2 *H. Bla.* 336.

214. S. P. contra. *Free and others* v. *Hawkins*, Holt, 550. Gibbs, C. J. 1817.

But see Appendix I.

Et vide *Smith* v. *Becket*, 13 East, 187. Bayley, 136, n.

215. So the drawer of an accommodation bill. *Collott and others* v. *Haigh*, 3 Campb. 281. Ellenborough, C. J. 1812.

N. And in France, the proof of assets lay, and lies, upon the drawer; Pothier, Traité du Contrat de Change, part I. chap. 5. num. 157. Code de Comm. l. 1. tit. 8. §. 2. num. 117.

216. But the indorser of a *bill* is, in all cases, intitled to notice, though the *drawer* have no effects in the hands of the *drawee*. *Wilkes and others* v. *Jacks*, *Peake*, 202. Kenyon, C. J. 1793.

Acc. *Brown* v. *Maffey*, 15 East, 216. S. C. Bayley, 137.

217. S. P. contra *Sisson* v. *Thomlinson*, Selw. N. P. 324, n. Ellenborough, C. J. 1805.

And see Pothier, Traité du Contrat de Change, part 1, chap. 5. num. 157, 8.

218. Where the acceptor is indebted to the drawer, an agreement between them that the latter shall take up the bill, will not dispense with notice. *Staples* v. *Okines*, 1 Esp. 333. Kenyon, C. J. 1795.

Acc. *Nicholson* v. *Gouthit*, 2 H. Bla. 607. *Esdaile* v. *Sowerby*, 11 East, 114. *Brown* v. *Maffey*, 15 East, 216. S. C. Bayley, 137.

219. Where A. had deposited deeds with B. an attorney, for the purpose of raising money, and B. had accepted a draft on account of the intended mortgage, the jury found, that these deeds were the effects of A. in the hands of B., though no money had been raised. *Walwyn and others* v. *St. Quintin*, 2 Esp. 514. Eyre, C. J. 1796.

220. And where, for the accommodation of A., the owner of the deeds, C. drew upon B. in favour of A., it was ruled, that C. was intitled to notice. *Ibid.*

But upon a motion for a new trial, the court of C. P. decided, that notice was not necessary; 1 Bos. and Pul. 651.

And see Vendor and Purchaser, F. post.

221. If the drawer had effects in the hands of the drawee, want of notice is not excused by shewing that he was not damnified. *Dennis* v. *Morrice*, 3 Esp. 158. Kenyon, C. J. 1800.

Sed vide Pothier, Traité du Contrat de Change, part 1. chap. 5. num. 157, 8.

222. Where one of three drawers of a bill is likewise the acceptor, notice of dishonour is unnecessary. *Porthouse* v. *Parker and others*, 1 Campb. 82. Ellenborough, C. J. 1807.

And see *Jacaud* v. *French*, 12 East, 317.

223. The holder of a bill is excused from giving notice of non-payment to the party intended to be charged, of whose place of abode he is ignorant; provided he use reasonable diligence in finding it out. *Bateman* v. *Joseph*, 2 Campb. 461. Ellenborough, C. J. 1810.

224. Whether such inquiry has been conducted with due diligence, is a question, not of law but of fact. *Ibid.*

And the court refused a rule for a new trial. *Ibid.* and 12 East, 433.

Contra *Sturges* v. *Derrick*, Wightw. 76.

225. An inquiry for the residence of an indorser, made at the place at which the bill purported to be payable, is not sufficient. *Beveridge* v. *Burgis*, 3 Campb. 262. Ellenborough, C. J. 1812.

226. Where, upon inquiry, it appears that the person entitled to notice has left the kingdom, no laches is imputable to the holder, unless it can be shewn that he knew where the party might have been found. *Harrison* v. *Fitzhenry*, 3 Esp. 240. Le Blanc, J. 1800.

227. Notice is not necessary, where it appears that the defendant, the drawer, had no effects in the hands of the drawee, though he had some reason to expect that the bill would be accepted on account of a claim which he had against the drawee's testator. *Legge* v. *Thorpe*, 2 Campb. 310. Ellenborough, C. J. 1810.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 12 East, 171.

And see the observations of Le Blanc, J. 12 East, 177.

223. Secus, where the expectation is grounded upon the consignment of a

cargo actually shipped, although the goods perish before they reach the drawee. *Rucker and another* v. *Hiller*, 3 Campb. 217. Ellenborough, C. J. 1812.

229. S. P. ruled in *Robins* v. *Gibson*, 3 Campb. 334. Ellenborough, C. J. 1813.

And see 12 East, 175; *ex parte*, Heath, 2 V. and B. 240.

230. It is not a sufficient ground to dispense with the proof of notice, that the balance of a fluctuating account between the drawer and the drawee is against the former. *Blackhan* v. *Doren*, 2 Campb. 503. Ellenborough, C. J. 1810.

231. Or that, *when the bill was presented*, the drawer was largely indebted to the drawees, who had appropriated all the effects of the drawer in their hands towards the liquidation of their debt; unless such appropriation were made with the privity of the drawer. *Ibid.*

N. The state of the accounts, *at the time the bill was drawn*, does not appear. But in *Orr* v. *Maginnis*, 7 East, 359, 61. 3 Smith, 328, it was held that this alone was material. *Claridge* v. *Dalton*, 4 M. and S. 226.

232. If the drawer has effects in the hands of the drawee at any time whilst the bill is running, he is intitled to notice of dishonour. *Hammond and others* v. *Dufrene*, 3 Campb. 145. Ellenborough, C. J. 1811, and K. B. 1812.

233. After notice of non-acceptance, notice of non-payment need not be given. *Price* v. *Dardell*, Chitty on Bills, 300. Kenyon, C. J. 1794.

Contra, Pothier, Traité du Contrat de Change, part 1, chap. 5, sect. 2, art. 1, § 3, num. 138.

234. It is no excuse for not giving notice to the drawer of non-payment by the acceptor, that the latter had previously informed the drawer of his inability to fulfil his engagement, and has given the drawer part of the amount for the purpose of enabling him to take up the bill, which he has engaged to do. *Baker* v. *Birch*, 3 Campb. 107. Ellenborough, C. J. 1811.

Forster v. *Jurdison*, 16 East, 105.

235. But in such case the sum advanced by the acceptor to the drawer, may be recovered by the holder of the bill, as money had and received to his use. *Ibid.*

236. The drawer of a bill, which is destroyed by accident, is intitled to notice of non-payment, though he has refused to give a new bill according to 9 and 10 Will. III. cap. 17. sect. 3. and though the drawee is bankrupt. *Thackray* v. *Blackett*, 3 Campb. 164. Ellenborough, C. J. 1812, and K. B. H. 1812.

237. So where two accommodation bills are drawn payable at different periods, and whilst both bills are running, the drawer contracts engagements on the account of the acceptor, to an amount which is fully covered by the bill which first becomes due, the drawer is intitled to notice of dishonour on both bills; as the transaction cannot be separated by setting the balance due from the acceptor, against the first bill exclusively. *Ibid.*

238. The maker of a promissory note, payable at a particular place, is not intitled to notice of dishonour. *Pearce* v. *Pemberthy and others*, 3 Campb. 261. Ellenborough, C. J. 1812.

G. (c) *Consequences of neglect.*

239. A bill indorsed by A., B., C., and D., successively, is refused acceptance; D. neglects to give notice of the non-acceptance to C. but upon non-payment at maturity, he returns the bill to B. who takes it up without notice of the laches; A. having been once discharged, his liability is not revived by the act of B. in paying the bill under an ignorance of the facts. *Roscow* (*Roscoe*) v. *Hardy*, 2 Campb. 458. Ellenborough. C. J. 1810.

And the court refused a rule to set aside nonsuit. *Ibid.* and 12 East, 434.

N. Where the holder of a dishonoured bill contents himself with giving notice to his immediate indorser, he commits his right to resort to prior parties to the chance of their receiving regular notice through such last indorser. To *secure* his remedy against any party, he must give immediate notice to such party. Vide Pothier, Traité du Contrat de

Change, part 1. chap. 5. sect. 2 art. 1. § 5. No. 153. And see Chitty on Bills, 295.

G. (d) *When waved.*

240. An admission by an indorser of his liability, made without notice of the laches of the indorsee, is not binding. *Rouse, executor,* v. *Redwood,* 1 Esp. 155. Kenyon, C. J. 1794.

N. And semble, that even with notice, a mere admission of liability, will not be sufficient to charge an *indorser* who was not the *drawer* of the bill, *Borradaile* v. *Lowe,* 4 Taunt. 93.

241. Or, if the indorser were not apprized of the *legal consequences* of such laches. *Rouse* v. *Redwood,* ubi supra; *Chatfield* v. *Paxton,* Chitty on Bills, 304. Kenyon, C. J. 1798.

But see *Bilbie* v. *Lumley,* 2 East, 471; *Williams* v. *Bartholomew,* 1 Bos. and Pull, 326; *Stevens* v. *Lynch,* 12 East, 38. These cases, in which the inconvenience of the rule laid down by Lord Kenyon was felt, and the distinctions of the civilians were not adverted to, seem to have established that ignorance of the law is in no case an excuse.

Sed vide Dig. 22. 6. Pothier, Traité de l'Action Condictio indebiti, part 2. sect. 2. art. 3. See also, Y. B. 20. H. 7. 2 b. per Fineux; Manser's case, 2 Co. 3; Doctor and Student, Dial. 2. cap. 46, 47.

242. "If I am bound to pay it I will," no waver of the want of notice. *Dennis* v. *Morice,* 3 Esp. 158. Kenyon, C. J. 1800.

243. "My residence is immaterial; I will inquire whether the bill is paid," a dispensation. *Phipson* v. *Kneller,* 4 Campb. 285. and 1 Stark. 116. Ellenborough, C. J. 1815.

244. Where an indorser, after being discharged by want of notice, has promised to pay the bill, it is still necessary to shew, that payment has been demanded from the acceptor before the commencement of the action. *Brown* v. *M'Dermot,* 5 Esp. 265. Ellenborough, C. J. 1805.

245. But it has since been held, that a promise to pay a note after it has become due, is presumptive evidence of presentment, and notice, in an action against an indorser. *Taylor* v. *Jones,* 2 Campb. 105. Bayley, J. 1809.

Acc. *Lundie* v. *Robertson,* 6 East, 231. *Potter* v. *Rayworth,* 13 East, 417.

246. But where the drawer, on being arrested, merely offers to *compromise* the action, it is neither an acknowledgment of notice, nor a waver of the irregularity. *Cuming* v. *French,* 2 Campb. 106. Ellenborough, C. J. 1809.

247. An express promise of payment by the drawer, is equivalent to notice of dishonour, in an action against the sheriff for not arresting him. *Gibbon* v. *Coggon, sheriff of Essex,* 2 Campb. 188. Ellenborough, C. J. 1809.

248. Notice of dishonour is dispensed with by a letter of defendant, stating the bill to have been for his accommodation, and that it will be paid. *Wood* v. *Brown,* 1 Stark. 217. Ellenborough, C. J. 1816.

II. Liability of drawer and indorsers.

H. (a) *When liable.*
(And see post, I. (e) 350.)

249. A person who pays a bill for the honour of an indorser, is not confined to seek his remedy against such indorser, but may sue all the parties to the bill. *Mertens* v. *Winnington,* 1 Esp. 113. Kenyon, C. J. 1794.

N. That was the case of an action against the drawer; and in Bayley, 146, 8, it is said, that the person who pays the bill, holds as upon a transfer from the party for whom he made the payment, not as upon a transfer from the party paid. But Pothier considers the person who pays a bill *supra protest,* as clothed with all the rights of the *last* holder, (subrogé aux droits du *créancier;*) *Traité du Contrat de Change, part 1. chap. 6. num. 171.* He, however, refers to a positive law; *Ordonnance de 1673, tit. 5. art. 3. ibid. num. 114.*

And see *Hull* v. *Pitfield,* 1 Wils. 46. S. C. Bayley, 148. *Ex parte Wackerbath,* 5 Ves. 574. *Ex parte Lambert,* 13 Ves. 179.

250. A. and B. trade under the firm of A. and Co.; A. and C. likewise trade under the same firm; B. is liable upon a bill issued by A. in the name of the

firm, though drawn with reference to the concern carried on exclusively by A. and C. *Baker and others* v. *Charlton*, Peake, 80. Kenyon, C. J. 1791.

And see *Shirriff* v. *Wilkes*, 1 East, 48. *Swan* v. *Steele*, 7 East, 210. S. C. 3 Smith, 109. *Ex parte Bonbonus*, 8 Ves. 542. *Ex parte Gordon*, 15 Ves. 286. *Jacaud* v. *French*, 12 East, 322. *Ridley* v. *Taylor*, 13 East, 175. *Emly* v. *Lye*, 15 East, 10.

251. Where bankers, in discounting a bill, give their customer bills or notes without indorsing them, which turn out to be bad, the bankers are not liable. *Fydell* v. *Clark et alt.* 1 Esp. 447. Kenyon, C. J. 1796.

S. P. *Bank of England* v. *Newman*, 1 Lord Raym. 442. *Ex parte Shuttleworth*, 3 Ves. J. 368. *Emly* v. *Lye*, 15 East, 7, 12.

252. A bill is drawn in favour of A. a foreign merchant, for value to be paid by his agent, on the next post day, *according to usage*. If the agent make default in payment, A. cannot sue the drawer. *Puget de Bras* v. *Forbes and Gregory*, 1 Esp. 117. Loughborough, C. J. 1792.

Acc. *Jefferies* v. *Austin*, 1 Strange, 674, 274. And see *Snelling* v. *Briggs*, Bull. N. P. 274.

253. An indorser is bound to take up a bill which is returned for *non-acceptance*. *Ballingalls* v. *Gloster*, 4 Esp. 268. Ellenborough, C. J. 1802.

And the court of K. B. discharged a rule for setting aside a verdict for the holder. *Ibid.* and 3 East, 481.

S. P. As to the liability of the *drawer*, *Bright* v. *Purrier*, Bull. N. P. 269. *Milford* v. *Mayor*, Dougl. 55.

N. Pothier, however, considers the drawer as merely liable to indemnify the holder against the probable non-payment at maturity. *Traité du Contrat de Change*, part 1. chap. 4. num. 70.

That every indorser is to be considered as a new drawer, see Shower's argument in *Claxton* v. *Smith*, 1 Show. 495. *Smallwood* v. *Vernon*, 1 Strange, 479. *Heylin* v. *Adamson*, 2 Burr. 674. 3 East, 482. Pothier, *ubi supra*, num. 79, 82.

254. In an action against the drawer of a bill, which has been refused acceptance, it is not sufficient to produce a witness, who went to the residence of the drawee, and was there told by a person, of whom the witness knew and knows nothing, that the bill would not be honoured. *Cheek, gent.* v. *Roper*, 5 Esp. 175. Ellenborough, C. J. 1804.

255. The indorsee of a bill which is not produced, cannot recover against an indorser upon proof that the bill was taken when due to the acceptor, who had absconded without returning it. *Powell* v. *Roach*, 6 Esp. 76. Ellenborough, C. J. 1807.

And see *Hart* v. *King*, 12 Mod. 310. S. C. 1 Show. 164. S. C. Holt, 118.

256. Although the defendant has expressly promised to pay, "if the bill could be produced." *Ibid.*

And see *Williamson* v. *Clements*, 1 Taunt. 523.

257. If A., the drawer and payee of a bill, indorse it in blank to B., who, without putting his own name, converts A.'s blank indorsement into a special indorsement to C.; B. cannot be sued as an indorser. *Vincent and others* v. *Horlock and others*, 1 Campb. 442. Ellenborough, C. J. 1808.

258. Bills drawn in London upon Lisbon, are indorsed by the defendants to the plaintiffs, and by them remitted to Lisbon, where they are refused payment in consequence of the unsettled state of that country. It is for the jury to say, whether there existed any course of exchange between Lisbon and London, when the bills became due; upon which will depend the defendants' liability to pay the re-exchange to the plaintiff, even though the latter have refused to accept the redrafts of the foreign holder for the amount. *De Tastet and others* v. *Baring and others*, 2 Campb. 65. Ellenborough, C. J. 1809.

And the court of K. B. discharged a rule for setting aside verdict for the defendants. *Ibid.* and 11 East, 265.

And see *Mellish* v. *Simeon*, 2 H. Bl. 378. *Pollard* v. *Herries*, 3 Bos. and Pul. 335. *Francis* v. *Rucker*, Ambler, 672, 4.

H. (b) *To what extent.*

And see post, I. (e) 349.

259. In an action by the payee of a bill drawn in Canada upon the defend-

ant, and accepted by him in England, the declaration averred that, in consequence of the bill's being returned to Canada dishonoured, the plaintiff had been compelled to pay to the indorsee 10 per cent. for re-exchange, and 6 per cent. interest, with other charges. Held, that the plaintiff's remedy for the re-exchange, &c. was against the drawer. *Woolsey* v. *Crawford*, 2 Campb. 445. Ellenborough, C. J. 1810.

Acc. *Napier* v. *Shneider*, 12 East, 420.

As to the extent to which the drawer is liable for re-exchange, see *Mellish* v. *Simeon*, 2 H. Bla. 378. *Francis* v. *Rucker*, Ambler, 672. 2 Bro. C. C. 597, 9. *Ex parte Hoffman*, Co. B. L. 186. *De Tastet* v. *Baring*, ante, H. (a) 258.

260. In an action against the drawer of a bill, drawn in Barbadoes on London, at 60 days after *sight*, and protested for non-acceptance and non-payment, a special jury gave 10 per cent. as damages, together with interest from the day on which the bill was presented for payment. *Gantt* v. *MacKenzie*, 3 Campb. 51. Ellenborough, C. J. 1811.

261. But where the bill was drawn in New South Wales, and the plaintiff claimed no percentage, interest was allowed from refusal of acceptance. *Harrison* v. *Dickson*, 3 Campb. 52. n. Ellenborough, C. J. 1811.

262. Upon a bill drawn in Bermuda on England, Bermuda interest, at 7½ per cent., was recovered. *Dougan* v. *Banks*, Chitty on Bills, 540. Guildhall, Sittings after Michaelmas Term, 1816.

And see Appendix, IV.

H. (c) *Where discharged.*

263. Held, that an agreement to forbear to sue the acceptor after notice of non-payment to the drawer, will discharge the latter. *Walwyn and others* v. *St. Quintin*, 2 Esp. 515. Eyre, C. J. 1796.

But upon a motion for a new trial, the court of C. P. determined, that this was no discharge. 1 Bos. and Pul. 652.

And see *Arundle Bank* v. *Goble*, Chitty on Bills, 379.

264. An agreement between the holder and acceptor of a dishonoured bill, that the latter shall pay the amount of the bill and no more, discharges the drawer, although his assignees are parties to the agreement. *De la Torre* v. *Barclay and Salkeld*, 1 Stark. 7. Ellenborough, C. J. 1814.

265. Prior parties are not discharged by a release to a *subsequent* party. *Smith* v. *Knox*. 3 Esp. 46. Eldon, C. J. 1799.

S. P. *Hayling* v. *Mulhall*, 2 Bla. 1235.

266. But if the holder give time to the acceptor, who is the party primarily liable, all the other parties are discharged. *English* v. *Darley*, 3 Esp. 49. Eldon, C. J. 1799.

And the court of C. P. refused a rule for a new trial. *Ibid.* and 2 Bos. and Pul. 61.

And see *Peel* v. *Tatlock*, 1 Bos. and Pul. 419. *Walwyn* v. *St. Quintin*, *ibid.* 652, 6. *Clark* v. *Devlin*, 3 Bos. and Pul. 363. *Rees* v. *Berrington*, 2 Ves. 540, 4. *Ex parte Wilson*, 11 Ves. 411. *Gould* v. *Robson*, 8 East, 576. *Trent Navigation Company* v. *Harley*, 10 East, 34.

267. So if the indorsee of a note release the maker, the payee is discharged. *R.* v. *Kemp*, Holroyd, J. Taunton, Ass. 1819.

268. And it was held, that even where the indorsee holds the note merely as a security for a claim which he has against his indorser, a release from such indorsee to the maker will render the latter a competent witness to invalidate the instrument, by proving that the witness's supposed signature is a forgery. *Ibid.*

N. But though such indorsee has the whole *legal* interest, yet, as the maker is also interested in destroying the equitable interest of the indorser, it would seem that the release of the indorsee would be insufficient.

269. Defendant being discharged by the laches of the holder, promises to pay the bill. This is a waver of the want of notice, but does not dispense with the necessity of shewing a demand of payment from the acceptor, at some time before action brought. *Brown* v. *M'Dermot*, 5 Esp. 265. Ellenborough, C. J. 1805.

270. Holder allows acceptor to re-

new the bill without consulting the indorser; but the indorser afterwards says to the acceptor, that it was the best thing that could be done. This is not a recognition of the terms granted by the holder to the acceptor; and the indorser is discharged. *Whithall* v. *Masterman and others*, 2 Campb. 179. Ellenborough, C. J. 1809.

And see *Forster* v. *Jurdison*, 16 East, 105.

I. ACTION.

I. (a) *Title of plaintiff.*

272. A bill is drawn payable to the order of the plaintiff; declaration states it to be payable *to the plaintiff;* no variance. *Jeffery* v. *Heard.* Best, J. Launceston Assizes, 1819.

273. Any persons may join in suing upon a bill indorsed in blank, without proving partnership or joint interest. *Lordaznz and another* v. *Leach*, 1 Stark. 446. Ellenborough, C. J. 1816.

And see EVIDENCE, G. (b). Ante, § 85, 9.

274. A. may sue on a note payable to him, *in trust for B. Smith* v. *Kendal, executor*, 1 Esp. 231. Kenyon, C. J. 1794.

And the court of K. B. appears to have paid no regard to an objection that the action should have been brought in the name of B; 6 T. R. 123.

And see *Ex parte Richardson*, 14 Ves. 187.

Or he may indorse it to a stranger. *Evans* v. *Cramlington*, Carth. 5. S. C. 2 Vent. 309. S. C. Skinner, 264.

275. If A., the holder of a promissory note, deposit it with B. as a security, in an action brought by A., against the maker he cannot call upon B.'s agent to produce the note. *Thompson* v. *Glover*. Abbott, C. J. Guildhall, Dec. 1818. And see 1 Taunt. 109.

276. To justify the refusal of the agent to produce the note, it is sufficient that he was *informed by B.* of the nature of his claim. *Ibid.*

277. Semble, that to intitle A. B., *junior*, to sue upon a note in favour of A. B., it is sufficient to prove that he is in possession of the instrument, and directed the bringing of the action. *Sweeting* v. *Fowler and another*, 1 Stark. 106. Bayley, J. 1815.

278. In an action on a promissory note, no objection was taken to its being made in Prussia. *Splitgerber* v. *Kohn*, 1 Stark. 125. Ellenborough, C. J. 1815.

279. A parol contemporaneous defeasance is no defence to an action on a note. *Rawson and another* v. *Walker*, 1 Stark. 361. Ellenborough, C. J. 1815. And *Duke* v. *Dow*, Chitty on Bills, 61. Gibbs, C. J. 1817.

280. Where a bill accepted by the defendant for a valuable consideration, or in the course of trade, is indorsed to the plaintiff, who advances part only of the amount, the whole sum may be recovered, and the plaintiff will be trustee for the indorser for the surplus. *Wiffen* v. *Roberts*, 1 Esp. 261. Kenyon, C. J.

281. But if the bill was accepted merely for the accommodation of the drawer, the indorsee can have a verdict only for the sum which he had actually paid for it. *Ibid.*

282. In an action by the payee against the acceptor, the latter may shew that he accepted the bill for value as to part, and as an accommodation to the plaintiff as to the rest. *Darnell* v. *Williams*, 2 Stark. 166. Ellenborough, C. J. 1817.

283. When bankers have accepted on account of a customer beyond the amount of his cash balance, they hold all collateral securities for value. *Bosanquet and others* v. *Dudman*, 1 Stark. 1. Ellenborough, C. J. 1814.

284. And they may recover against an accommodation acceptor, although the customer, who had previously deposited the bill, had it in his hands when it became due, and agreed to deliver it up for a valuable consideration, instead of which it was re-delivered to the plaintiffs. *Ibid.*

285. Bankers with whom a note is deposited as a security, may recover against the maker, although they returned the note to the payee when it became due to procure payment, and the note remained in his hands till his bankruptcy, when it came into the possession of his assignees. *Bruce and others* v. *Hurley*, 1 Stark. 23. Ellenborough, C. J. 1815. Ante, § 275, 6.

286. In an action against the acceptor of a bill by an indorsee for a valuable consideration, it is no defence, that the

bill was accepted merely for the accommodation of the drawer, and that this was known to the plaintiff. *Smith* v. *Knox*, 3 Esp. 46. Eldon, C. J. 1799.

287. Secus, where the indorsee has notice that the bill was drawn for a *particular purpose. Ibid.*

Ante, 148, post, DEBTOR.

288. A bill drawn by A. is by him indorsed and sent to B., with directions to discount and remit the proceeds to A., for the purpose of taking up a bill to which B. is a party; B. retains the second bill, and being afterwards compelled to take up the first, proves the amount under A.'s commission; B. may sue the acceptor of the second bill. *Walsh* v. *Tyler*, Chitty on Bills, 183. 2 Stark. 288. Ellenborough, C. J. 1817.

289. Holder for value of a bill indorsed in blank by the payee, is intitled to recover against the acceptor, although the bill appear to have been stolen from some prior holder, who immediately advertised his loss. *Sir John Lawson and others* v. *Weston and others*, 4 Esp. 56. Kenyon, C. J. 1801.

Sed vide *Paterson* v. *Hardacre*, 4 Taunt. 115.

290. A payment by the acceptor out of the usual course of business, as by anticipation, leaves him responsible to the true owner of the bill. *De Silva* v. *Fuller*, Esp. D. N. P. 51. London, 1776.

291. But the circumstance of a bill of large amount, (500l.) being brought by a stranger to be discounted, does not impose upon the banker any obligation to inquire into the manner in which the party became possessed of such bill, although it be usual to make such inquiries when bills so large are offered. *Lawson* v. *Weston, ubi supra.*

292. In an action by an indorsee upon a bill drawn by the defendant under duress of imprisonment and menaces of death, it is incumbent on the plaintiff to give some evidence of consideration, although the bill came to the hands of the plaintiff before it was due. *Duncan* v. *Scott*, 1 Campb. 100. Ellenborough, C. J. 1807.

293. The indorsee of a bill drawn payable to the order of a fictitious person, cannot recover against the acceptor, unless it appears that the latter was apprised of the fiction, or that the money has found its way into his hands. *Bennett* v. *Farnell*, 1 Campb. 130, 180. Ellenborough, C. J. 1807, and K. B. 1808.

And see *ex parte Clarke*, 3 Bro. 238. *Ex parte Allen*, C. B. L. 184, 5. 1 Mont. B. L. 145. 6 Brown Parl. Cases, 8vo. 235, 255. *Leach* v. *Hewitt*, 4 Taunt. 671.

294. Possession is *primâ facie* evidence of property in negotiable instruments, (payable to the bearer.) *King* v. *Milsom*, 2 Campb. 5. Ellenborough, C. J. 1809.

And see post, TROVER, A. 2. *Blackham's* case, 1 Salk. 290. cited 2 Saund. 47, and where it is referred to in support of a general position, which the case seems hardly to warrant, namely, that possession is *primâ facie* evidence of property. See also *Paterson* v. *Hardacre*, 4 Taunt. 115, 7. 13 Ves. 119.

295. And proof that a bill was at a particular period in the possession of the plaintiff, and that it was advertised as lost in a newspaper taken in by the defendant, will not entitle the plaintiff to call upon him to shew what consideration he gave for it. *Ibid.*

Vide *Anon.* 1 Salk. 126. S. C. 1 Lord Raym. 738. *Miller* v. *Race*, 1 Burr. 453. *Grant* v. *Vaughan*, 3 Burr. 1516. S. C. 1 Bla. 485. *Lowndes* v. *Anderson*, 13 East, 130. 5.

296. But where, in an action by indorsee against acceptor, it appeared that the drawer had been tricked out of the bill by a gross fraud, the plaintiff was required to shew what consideration he had given for it. *Rees* v. *Marquis of Headfort*, 2 Campb. 574. Ellenborough, C. J. 1811.

297. Where the holder of a cheque expresses his intention of eluding a condition upon which he received it from the drawer, the latter is justified in stopping the payment of it. *Wienholt* v. *Spitta*, 3 Campb. 376. Ellenborough, C. J. 1813.

I. (b) *At what period right of action attaches.*

298. Indorsee may sue the *indorser* immediately upon the refusal of acceptance. *Ballingalls* v. *Gloster*, 4 Esp. 268. Ellenborough, C. J. 1802.

And the court of K. B. discharged a rule for setting aside a verdict for the plaintiff. *Ibid.* and 3 East, 481.

S. P. as to the *drawer*, *Bright* v. *Purrier*, Bull. N. P. 369. *Milford* v. *Mayor*, Dougl. 55.

299. A. accepts a bill as a security for freight, to be renewed for three months, if A. was not returned before the bill became due; no application being made for such renewal, the holder may sue before the expiration of three months. *Gibbon and others* v. *Scott*, 2 Stark. 286. Ellenborough, C. J. 1817.

I. (c) *Facts necessary to be proved.*

And see WITNESS, D. (c).

300. The indorsement of a note by the payee is an admission, as against him, of the hand-writing of the maker. *Free and others* v. *Hawkins*, Holt, 550. Gibbs, C. J. 1817.

301. In an action by indorsee against acceptor, the indorsement of the payee must be proved though he be also the drawer. *Macferson* v. *Thoytes*, Peake, 20. Kenyon, C. J. 1790.

S. P. *Robinson* v. *Yarrow*, 7 Taunt. 455. 1 Moore, 150, S. C.

And see *Whitcomb* v. *Whiting*, Dougl. 650, 3.

302. Although his name were on the bill at the time of the acceptance. *Bosanquet* v. *Anderson*, 6 Esp. 43. Ellenborough, C. J. 1806.

S. P. *Smith* v. *Chester*, 1 T. R. 654.

303. And if several indorsements are set out on the declaration, they must all be proved, notwithstanding they appeared on the bill at the time it was accepted. *Ibid.*

304. But where the acceptor, when the bill becomes due, offers to renew it, he admits the several indorsements. *Ibid.*

305. A letter from defendant to plaintiff, offering another bill, and expressing a hope that the bill was not in the hands of A., a prior indorser, dispensed with proof of the indorsement to A. *Sidford* v. *Chambers*, 1 Stark. 326. Ellenborough, C. J. 1816.

306. A count on a bill drawn by plaintiff in favour of A., accepted by defendant, dishonoured and returned to plaintiff, is supported by producing the bill, proving the acceptance and A.'s indorsement, and shewing that it was taken when due to the defendant's house, that the house was shut, and defendant could not be found. *Barton and another* v. *Camp.* Ellenborough, C. J. Guildhall, Easter T. 1805.

307. In an action against A. and B., as makers of a note, A. suffers judgment by default; the signature of A. must be proved at the trial against B. *Grey et alt* v. *Palmers and Hodgson*, 1 Esp. 135. Kenyon, C. J. 1794.

And see *Mills* v. *Lync*, Bayley, 227. n. (g).

308. Semble, that in an action by the indorsee of a promissory note against the maker, an admission by the payee of his indorsement is evidence. *Moddocks* v. *Hankey*, 2 Esp. 647. Kenyon, C. J. 1798.

309. In an action against a remote indorsee, the indorsements subsequent to that of the payee, (who indorses in blank,) and preceding that of the defendant, need not be proved. *Chaters* v. *Bell and others*, 4 Esp. 210. Ellenborough, C. J. 1803.

310. Nor is it necessary to prove the indorsement of the payee. *Critchlow* v. *Parry*, 2 Campb. 182. Ellenborough, C. J 1809.

Acc. *Lambert* v. *Pack*, 1 Salk. 127. S. C. 12 Mod. 244. S. C. Holt, 117. S. C. 1 Lord Raymond, 443.

311. Notice need not be given to produce a letter containing notice of dishonour. *Roberts* v. *Bradshaw*, 1 Stark. 28. Ellenborough, C. J. 1815.

312. Proof that duplicate notices of dishonour were written, and that a letter was sent to the defendant on the same day, will, upon the non-production of the letter after notice, be evidence of notice of dishonour, without otherwise identifying the letter delivered. *Ibid.*

And the court of K. B. refused a rule for a new trial. *Ibid.*

313. The maker of a note, whose signature has been proved in an action by the payee, cannot insist upon the indorsements being read. *Stone* v. *Metcalf*, 1 Stark. 53. Ellenborough, C. J. 1815.

314. A witness called to prove the maker's hand-writing cannot be cross-

examined as to an indorsement to which there is an attesting witness. *Ibid.*

315. Where a promissory note of 20 years date is unaccounted for, the jury may presume payment. *Duffield* v. *Creed*, 5 Esp. 52. Ellenborough, C. J. 1803.

316. In an action against three persons as drawers of a bill accepted by one of the drawers, proof of the acceptance is evidence that the bill was regularly drawn. *Porthouse* v. *Parker and others*, 1 Campb. 82. Ellenborough, C. J. 1807.

And see post, PLEADING, H. (a).

317. In an action upon a bill drawn payable to the order of two persons, *not partners*, indorsed by one in the name of both, and *afterwards* accepted by the defendant, it was held, that the regularity of the indorsement could not be disputed. *Jones and another* v. *Radford*, 1 Campb. 83. n. Ellenborough, C. J. 1806.

S. P. contra, *Carvick* v. *Vickery*, Dougl. 153. And see *Hankey* v. *Wilson*, Sayer, 223.

318. In an action against two persons as drawers of a bill, it is sufficient to shew that two persons bearing the surnames of the defendants are in partnership, and that one of the partners acknowledged that the bill was drawn by them, without shewing that the defendants bear the christian names assigned to them on the record. *Hodenpyl* v. *Vingerhoed and another*, Chitty on Bills, 489. Abbott, J. 1818.

And see ante, ABATEMENT, 6.

319. In an action by the *indorsee* of a note payable to A. *or bearer*, the indorsement need not be noticed in the declaration. *Waynam* v. *Bend*, 1 Campb. 175. Ellenborough. C. J. 1808.

320. But if averred it must be proved. *Ibid.*

And see *Rex* v. *Stevens*, 5 East, 244. S. C. 1 Smith, 437. Post, 325; but see *Williamson* v. *Allison*, 2 East, 446. *Peppin* v. *Solomon*, 5 T. R. 496.

321. A general receipt indorsed on a bill, imports, *primâ facie*, that the amount has been paid by the acceptor, and will not of itself be evidence of its having been paid by the drawer though produced by him. It will rather be presumed, that, after payment by the acceptor, the bill was delivered up on a settlement of accounts. *Scholey* v. *Walsby*, Peake, 24. Kenyon, C. J. 1790.

322. But in an action by an accommodation acceptor, against the drawer, the production of the bill is not *primâ facie* evidence that the former paid it, without proof that it has been in circulation since it was accepted. *Pfiel* v. *Vanbatenberg*, 2 Campb. 439. Ellenborough, C. J. 1810.

323. And payment is not to be presumed from the appearance of a receipt indorsed on the bill, unless this receipt is shewn to be in the hand-writing of the defendant or some other person entitled to demand payment. *Ibid.*

324. In an action against the drawers of a bill which is not paid when due, it is immaterial whether it was ever accepted by the drawee or not. *Jones* v. *Morgan and another*, 2 Campb. 474. Ellenborough, C. J. 1810.

325. If, however, an acceptance be unnecessarily averred in the declaration, it must be proved as laid. *Ibid.*

326. In an action by a second indorsee against the drawer and payee, proof that the bill purported to have been accepted when it was indorsed to the plaintiff does not supersede the necessity of proving an actual acceptance. *Smith* v. *Bellamy*, 2 Stark. 223. Ellenborough, C. J. 1817.

327. The plaintiff in such case must either allege and prove an actual acceptance, or charge the drawer with having drawn the bill upon a non-existing person. *Ibid.*

328. And it was *ruled*, than an express promise of payment after the bill became due, was not an admission of the acceptance. *Ibid.*

But in the following term his lordship concurred with the rest of the judges in K. B. in setting aside a nonsuit directed on this ground. *Ibid.*

329. In an action by indorsee against acceptor, the defendant cannot, by merely giving notice that such proof will be required, compel the plaintiff to shew what consideration he has given. Before such proof can be called for, some suspicion must be thrown upon the plaintiff's title. *Reynolds* v. *Chettle*, 2 Campb. 596. Ellenborough, C. J. 1811.

330. S. P. *Clarke* v. *Elliott*, Selw. N. P. 304. London Sittings, B. R. after M. T. 1811.

331. It was afterwards held that where such notice has been given, the plaintiff must make the proof of consideration part of his case, and not reserve it for the reply. *Delaney* v. *Mitchell*, 1 Stark. 439. Ellenborough, C. J. 1815, and *Humbert* v. *Reeding*, Chitty on Bills, 512. Ellenborough, C. J. 1817.

332. But the present Chief Justice has, at Nisi Prius, declared the former to be the correct course. Chitty, 512, (3).

See post, EVIDENCE, E. (a). *Paterson* v. *Hardacre*, 4 Taunt. 115.

333. A bill drawn on the defendant, was accepted by him, payable at the plaintiffs' banking-house, and was paid accordingly by them. The indorsement of the payee must be proved in the same manner as in an action by indorsee against acceptor. *Forster and others* v. *Clements*, 2 Campb. 17. Ellenborough, C. J. 1809.

As to the latter point, see *Cheap* v. *Harley*, 3 T. R. 127; *Mead* v. *Young*, 4 T. R. 28.

334. A promissory note, dated abroad, may be declared on as made at the venue, without a scilicet. *Houriet and another* v. *Morris*, 3 Campb. 303. Ellenborough, C. J. 1812.

Acc. *Ward* v. *Kidswin*, Latch. 77, 84. Sed vide Doct. and Stud. dial. 2, chap. 2. And see Vaughan, 92, 413. Co. Litt. 6 a. 261, b. Sav. 35, pl. 84; Bro. Abr. Fait. 94, *ib.* Jurisdiction, 15; F. N. B. 14 6 E. *ib.* 179 K. note (a) *ib.* 182 A. note (b) 27 Ass. 43; Gilb. C. P. 82.

335. In an action on a bill payable after sight, the true day of presenting for acceptance need not be alledged. *Forman* v. *Jacob*, 1 Stark. 46. Ellenborough, C. J. 1815.

336. And a subsequent allegation of presentment for payment, when the bill became due and payable, to wit, on a day calculated from the time when the bill was drawn, is supported by proof of presentment on the day when it became due, according to the day of presentment for acceptance. *Ibid.*

337. A verbal agreement at the time of the making of the instrument that it shall be renewed at maturity, cannot be set up as a defence. *Hoare and others* v. *Graham and another*, 3 Campb. 57. Ellenborough, C. J. 1811.

Sed vide *Snowball* v. *Vicaris*, Bunb. 175. And see *Moller* v. *Living*, 4 Taunt. 202.

338. An indorser in blank cannot recover, where the bill has been lost after notice of trial given, although the defendant has acknowledged his acceptance since action brought, and more than six years have elapsed since the bill became due. *Poole* v. *Smith*, Holt, 144. Gibbs, C. J. 1816.

I. (d) *Indebitatus assumpsit in respect of notes and bills.*

339. An action for money had and received will lie for the *indorsee* of a promissory note against the maker. *Dimsdale and others* v. *Lanchester*, 4 Esp. 201. Ellenborough, C. J. 1803.

340. In an action by the indorsee of a bill against a party who has received money from the acceptors to discharge it, any defence may be set up of which the acceptors could have availed themselves if the action had been brought against them. *Redshaw* v. *Jackson and another*, 1 Campb. 372. Ellenborough, C. J. 1808.

And see *Harris* v. *Brevoir*, Cro. Jac. 687. S. C. fuller 2 Roll. Rep. 440.

342. An accommodation acceptor, who defends an action at the request of the drawer, may recover the costs as money paid to the use of the latter, without an undertaking in writing. *Howes* v. *Martin*, 1 Esp. 162. Kenyon, C. J. 1794.

342. An indorsee in an action against the acceptor, who is discharged by a material alteration in the instrument, cannot resort to the money counts. *Long* v. *Moore*, 3 Esp. 155, n. Kenyon, C. J. 1790.

343. A. authorizes B. to make a note in A.'s name, in favour of C., for 100*l.*, of which A. is to receive 60*l.*, and B. the remaining 40*l.* B. signs A.'s name to a note for 140*l.* C. cannot sue A. on the note, but may recover the 60*l.* as money lent. *Pawley* v. *Brown*. Abbott, J. Devon, Lent Assizes, 1818.

344. Where the plaintiff proves nothing but a promise to pay the amount of the note declared on, and does not produce

it or shew it to be lost, he cannot recover either on the special or common counts. *Dangerfield* v. *Wilby*, 4 Esp. 159. Ellenborough, C. J. 1802.

345. A promissory note payable to bearer, is not evidence of money received by the maker to the use of the holder. *Waynam* v. *Bend*, 1 Campb. 175. Ellenborough, C. J. 1808.

Sed vide Bayley on Bills, 163; *Grant* v. *Vaughan*, 3 Burr. 1516; *Tatlock* v. *Harris*, 3 T. R. 175; *Johnson* v. *Collings*, 1 East, 98; *Williams* v. *Everett*, 14 East, 582.

346. But in an action against the acceptor of a bill drawn by the plaintiff *to his own order*, the acceptance is evidence of money received to the use of the plaintiff. *Thompson and another* v. *Morgan*, 3 Campb. 101. Ellenborough, C. J. 1811.

And see *Tinley* v. *Bagnall*, K. B. M. T. 23 Geo. III. Lawes, P. A. 489.

347. A person finding that he shall be unable to pay his acceptance, advances part of the amount to the drawer to assist him in taking it up. This is money had and received by the latter to the use of the holder. *Baker* v. *Birch*, 3 Campb. 107. Ellenborough, C. J. 1811.

348. The drawees inform the holder that the bill will be paid, upon the settlement of a loss, with the underwriters' money. The sum received from the underwriters, not exceeding the amount of the bill, is money received to the use of the holder. *Langston and others* v. *Corney and others*, 4 Campb. 176. Gibbs, C. J. 1815.

Ante Agent, 120, 1, Agreement, 31.

I. (e) *Trover for notes and bills.*
(And see post, Trover.)

349. In trover for bills of exchange, the verdict should be for the amount of principal and interest, due at the period of the conversion. *Mercer* v. *Jones*, 3 Campb. 477. Ellenborough, C. J. 1813.

N. In *Atkins* v. *Wheeler*, in error, interest was allowed from the date of the final judgment in trover, upon bills due before the judgment, and upon those due afterwards, from the time they were in cash. 2 N. R. 205.

BOND.

(And see post, Deed.)

A. Condition, how construed.

B. Damages, how assessed.

C. Bond, where satisfied.

A. Condition, how construed.
(And see Stamps, A. 5, 6.)

1. The condition of an indemnity bond is not restrained by a recital professing to state the agreement between the parties, where other transactions are mentioned in the body of the condition, which have no reference to such recital. *Sansom and others* v. *James Bell*, 2 Campb. 39. Ellenborough, C. J. 1809.

S. P. semble admit: per Mansfield, C. J. 2 N. R. 180, *Wardens of St. Saviour's, Southwark*, v. *Bostock*.

And see *Lord Arlington* v. *Merrick*, 2 Saund. 414, n. 5; *Company of Proprietors of the Liverpool Water Works* v. *Atkinson*, 6 East, 507. S. C. 2 Smith, 654.

2. A bond of indemnity given to the plaintiffs, *as trustees of an unincorporated Insurance Company*, conditioned for the good conduct of a clerk, *during his continuance in the service of the company*, is not affected by any changes amongst the members of which the company is composed. *Metcalfe and others* v. *Bruin*, 2 Campb. 422. Ellenborough, C. J. 1810.

And the court of K. B. discharged a rule for a new trial, after verdict for the plaintiff. *Ibid.* and 12 East, 400.

And see *Barclay* v. *Lucas*, 1 T. R. 291, n. *Strange* v. *Lee*, 3 East, 484. *Dance* v. *Girdler*, 1 N. R. 34; *Arlington* v. *Merrick*, 2 Saund. 414, n. 5.

3. A bond of indemnity for the faithful payment to the plaintiffs of all sum which J. S. may receive on their account, does not cover sums received by J. S. and a person whom he takes into partnership with the privity of the plaintiffs. *Bellairs and another* v. *Ebsworth*, 3 Campb. 53, Ellenborough, C. J. 1811.

And see *Wright* v. *Russell*, 3 Wils.

530. S. C. 2 Bla. 934. *Liverpool Waterworks Company* v. *Atkinson*, 6 East, 507. S. C. 2 Smith, 654. *Wardens of St. Saviour's, Southwark*, v. *Bostock*, 2 N. R. 175. *Jones* v. *Hull*, 5 Wentw. 517, 20.

4. Where the condition is to pay a less sum on demand, a demand before action brought must be proved. *Carter* v. *Ring*, 3 Campb. 459. Ellenborough, C. J. 1813.

5. A sworn broker suffering another person to act concurrently, though without any express communication, with himself, is not guilty of a breach of a condition not to employ any person *under* him. *Mayor, &c. of London* v. *Brandon*, 2 Stark. 1 . Ellenborough, C. J. 1816.

B. Damages, how assessed.

6. The obligee of an indemnity bond, after proving the affirmative of the issue upon *non est factum*, must shew the quantum of damage, under 8 and 9 Will. 3; cap. 11. *The Governor and Company of the Chelsea Waterworks* v. *Cowper*, 1 Esp. 276. Kenyon, C. J. 1795.

S. P. *Ethersey* v. *Jackson*, 8 T. R. 255. 2 Saund. 187, a. n. Cont. *De la rue* v. *Stewart*, 2 N. R. 362.

7. On the bond given to the society of Lincoln's Inn, on the obligor's being called to the bar, he is liable for "absent commons," "vacation commons," "preacher's duties," and "pensions," accruing while he remains a member of the Society, although he has never lived in the Inn, or practised at the bar. *The Earl of Rosslyn and another, executors of the Earl of Rosslyn, deceased*, v. *Jodrell, esq.* 4 Campb. 303. S. C. less fully, 1 Stark. 147. Ellenborough, C. J. 1815.

8. On a bond to indemnify against another bond, which, though forfeited, had not been enforced against the now plaintiff, the penalty of the second bond was said to be the only measure of damages. *Wood* v. *Wade*, 2 Stark. 167. Ellenborough, C. J. 1817.

N. Upon this statement, it is presumed, that the real debt in the former bond, exceeded the penalty of the latter.

9. At the execution of a writ of inquiry, after judgment on demurrer to the declaration, the production of a bond which appears to have a condition corresponding with the suggestion, is insufficient, without shewing that the bond put in is the same with that of which profert has been made, and upon which judgment was obtained. *Hodgkinson* v. *Marsden*, 2 Campb. 121. Ellenborough, C. J. 1809.

And see post, Covenant, C.

10. Where breaches are assigned in the declaration under 8 and 9 W. III. cap. 2. sect. 8., and non est factum pleaded, the jury may assess damages on the common venire. *Parkins and another* v. *Hawkshaw*, 2 Stark. 381.

11. A bond, though voluntary, bears interest from the day of payment. *Hellier* v. *Franklin*, 1 Stark. 291. Ellenborough, C. J. 1816.

N. On a bond conditioned for the payment of a smaller sum, interest is payable from the day of payment, though not expressly reserved; *Farquhar, bart.* v. *Morris*, 7 T. R. 124. But not on a single bond; *Hogan* v. *Page*, 1 Bos. and Pull. 337. Where no day is fixed for the payment of the smaller sum, it becomes due on the execution of the bond. And in an action thereon, the court will refer it to the master, to compute principal, interest, and costs; and on payment, will order the proceedings to be stayed, under 4 Ann. cap. 16. sect. 13. *Farquhar* v. *Morris*, *ubi supra.* And see Co. Litt. 208. a. Cro. Eliz. 798. But they will not permit the money to be brought into court. Anon. B. R. E. 1785. Selw. N. P. 513.

12. Upon an engagement to replace stock, the plaintiff is entitled to the price of stock on the day of trial, and is not restricted to the day specified for replacing it. *Downes* v. *Back*, 1 Stark. 318. Ellenborough, C. J. 1816.

C. Bond, where satisfied.

13. Payment of *principal* only will support a plea of *solvit post diem*. *Dixon* v. *Parkes*, *et alt.* 1 Esp. 110. Kenyon, C. J. 1794.

14. Therefore by accepting the principal, the obligee loses his remedy for interest, which can only be given in the shape of *accessory* damages. *Ibid.* S. C. 5 Wentw. 510, 8.

15. S. P. dub: and point reserved, but not moved by obligor. *Hellier* v. *Franklin*, 1 Stark. 291. Ellenborough, C. J. 1816.

16. In an action against a surety, payments by principal, after execution of the bond, cannot be considered as made in discharge of the bond, without shewing that they were so intended. *Plomer and others* v. *Long*, 1 Stark, 153. Ellenborough, C. J. 1816.

17. After a lapse of twenty years, satisfaction will be presumed. *Colsell and others, executors, &c.* v. *Budd and others, executors*, 1 Campb. 27. Ellenborough, C. J. 1807.

18. Nor is the presumption rebutted by proof that the party was in embarrassed circumstances during the remainder of his life. *Willaume* v. *Gorges*, 1 Campb. 217. Ellenborough, C. J. 1808.

19. Secus, where the party has been the whole time resident abroad. *Newman* v. *Newman*, 1 Stark. 101. Ellenborough, C. J. 1815.

20. A shorter period will not raise such a presumption, unless corroborated by other circumstances; as a settlement of accounts between the parties. *Colsell* v. *Budd, ubi supra.*

And see 3 Peere Williams, 287, note. *Rex* v. *Stephens*, 1 Burr. 434, Winchelsea causes, 3 Burr. 1963; *Forbes* v. *Wale*, 1 Bla. 532; *Oswald* v. *Legh*, 1 T. R. 270.

21. Indorsements in the hand-writing of the obligee, acknowledging the receipt of interest and of part of principal, are not evidence that the bond was unsatisfied, unless it be shewn that such indorsements were on the bond at, or recently after, the time they bear date, and that they were written at a period when they operated against the writer's interest. *Rose, administrator, &c.* v. *Bryant*, 2 Campb. 321. Ellenborough, C. J. 1809.

And see *Searle* v. *Lord Barrington*, 2 Stra. 826; *Glyn* v. *Bank of England*, 2 Ves. 42, 3.

22. The obligee by engaging to give time to the principal obligor, discharges the sureties. *Orme* v. *Young*, Holt, 84. Gibbs, C. J. 1815.

23. But not by merely omitting to exact the money; though no notice be given to the surety of the default of the principal. *Ibid.*

CARRIERS.

A. Ownership of carriage.

B. Conveyance of persons.

C. Conveyance of goods.

(a) *Carrier, to whom responsible.*

(b) *To what extent.*

D. Pleadings.

E. Evidence.

A. Ownership of carriage.

1. B. is liable for the misfeasance of a driver employed by A., with whom B. is a joint proprietor, though they have different portions of the road, and are not therefore partners inter se. *Waland* v. *Elkins*, 1 Stark. 281. Ellenborough, C. J. 1816. Post, Evidence, 88. Partner, A.

B. Conveyance of persons.

(And see ante, Action on the case, B. (a), post, Ship.)

2. The proprietors of a *mail coach* are answerable for an injury occasioned by the negligence of the driver. *White* v. *Boulton and others*, Peake, 81. Kenyon, C. J. 1791.

And see *Jones* v. *Hart*, 2 Salk. 441; *Brucker* v. *Fromont*, 6 T. R. 659, 61.

3. Where a party upon engaging a place in a stage coach, pays merely a deposit, the proprietor may put in another person, if the party be not at the coach at the appointed time. *Ker* v. *Mountain*, 1 Esp. 27. Kenyon, C. J. 1793.

4. But where the whole fare is paid, the place must be kept open during the whole journey. *Ibid.*

5. Coach owners do not insure the *persons* of passengers against accidental injuries. They are responsible only for negligence. *Aston* v. *Heaven and another*, 2 Esp. 533. Eyre, C. J. 1797.

6. S. P. ruled in *Christie* v. *Griggs*, 2 Campb. 79. Mansfield, C. J. 1809.

7. S. P. *Devereux* v. *Boyce*. Holroyd, J. Winchester Spring Assizes, 1819.

8. It is proved, that at the time of the overturning of a stage coach, it was

carrying more passengers than the act of parliament allowed. This is *conclusive* evidence that the accident arose from over-loading of the coach. *Israel* v. *Clark and Clinch*, 4 Esp. 259. Ellenborough, C. J. 1803.

And see 50 Geo. III. cap. 48, S. 2.

9. Where an accident is occasioned by a stage coach being loaded with a greater number of passengers than its strength or construction will allow it to bear, it is no excuse that the number does not exceed the statute allowance. *Ibid.*

10. The driver of a stage coach from A. to B. is bound to carry his passengers from the usual place of taking up to the usual place of setting down, and cannot require them to get down as soon as they reach any part of B. *Dudley* v. *Smith*, 1 Campb. 167. Ellenborough, C. J. 1808.

11. And, if the road be such as to require any extraordinary degree of caution on the part of the passengers, he is bound to warn them of the full extent of the danger. *Ibid.*

12. The breaking down or overturning of a stage coach is *primâ facie* evidence of negligence on the part of the owner. *Christie* v. *Griggs*, 2 Campb. 79. Mansfield, C. J. 1809.

13. The master of a vessel has a lien upon the *luggage* of a passenger; but he cannot detain his *person*, or the *clothes* which he has on. *Wolf* v. *Summers*, 2 Campb. 631. Lawrence, J. 1811.

And see post, C. (b) 27.

N. But an innkeeper may detain a guest until he pay his reckoning. *Newton* v. *Trigg*, 1 Show. 245, 68; 14 Vin. Abr. Inns, B. 2 Burt. E. P. 392; or his horse, Y. B. 5 E. 4, 2 b.

C. Conveyance of goods.

C. (a) *Carrier, to whom responsible.*

14. The delivery of goods to a carrier, appointed by vendee, vests the property in the vendee; and the vendor cannot maintain an action against the carrier for non-delivery. *Dawes* v. *Peck*, 3 Esp. 12. Kenyon, C. J. 1799.

And the court of K. B. discharged a rule for setting aside nonsuit. *Ibid.* and 8 T. R. 330.

S. P. *Snee* v. *Prescott*, 1 Atk. 248.

Cont. *Flewellin* v. *Rave*, 1 Bulst. 68.

And see F. N. B. 138 A. *Godfrey* v. *Furzo*, 3 P. Williams, 185, 6; *Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659; *Dutton* v. *Solomonson*, 3 Bos. and Pul. 582; *Jacobs* v. *Nelson*, 3 Taunt. 423.

15. Although the carrier is to be paid by the vendor. *King and another* v. *Meredith*, 2 Campb. 639. Lawrence, J. Gloucester, 1811.

16. An averment that A. undertook to deliver goods for B. is not supported by evidence of an agreement to deliver them to the bearer of a receipt given at the time of delivery. *Samuel* v. *Darch and others*, 2 Stark. 60. Ellenborough, C. J. 1817.

17. But where the bill of lading expressed that the freight had been paid by the shipper in London, it was held that they might maintain an action for non-delivery. *Joseph* v. *Knox*, 3 Campb. 320. Ellenborough, C. J. 1813.

C. (b) *To what extent.*

(And see post, Trover, B.)

18. Held, that common carriers being chargeable for losses by operation of law, cannot discharge themselves by notice. *Hide* v. *Proprietors of Trent and Mersey Navigation*, 1 Esp. 36. Kenyon, C. J. 1793.

S. C. not S. P. 5 T. R. 389. S. P. contra, *Clay* v. *Willan*, 2 H. Bla. 198; *Yate* v. *Willan*, 2 East, 123; *Izod* v. *Mountain*, 4 East, 371; *Lyon* v. *Mells*, 5 East, 428, 31, 3. S. C. 1 Smith, 478, 82; *Packwood* v. *Harris*, 3 Taunt. 264, where the power of restraining the liability is particularly considered. *Bignold* v. *Waterhouse*, 1 M. and S. 255.

19. But it has since been held, that a carrier may not only limit his responsibility to a certain amount, but exclude it altogether by notice. *Maving* v. *Todd and others*, 4 Campb. 225. 1 Stark. 72. Ellenborough, C. J. 1815.

20. Such notice to the consignor is equivalent to notice to the consignee. *Ibid.*

21. Semble, that a hoyman known to use a particular wharf, is not discharged by delivering goods to the wharfinger, but continues to be liable until they are

received by the party to whom they are directed. *Wardell* v. *Mourillyan*, 2 Esp. 693. Kenyon, C. J. 1798.

22. Where goods in the care of a lighterman are injured by an event unconnected with his ordinary duty, he is not liable, unless the owner *declare upon* and prove a special contract providing for such event. *Whalley* v. *Wray*, 3 Esp. 74. Kenyon, C. J. 1800.

23. A carrier by water is responsible for an accident arising from an unseen nuisance in the navigation. *Proprietors of the Trent Navigation* v. *Wood*, 3 Esp. 127. K. B. E. 1785.

Acc. *Forward* v. *Pittard*, 1 T. R. 27.

24. And a custom for the owners to insure against such losses, is not sufficient to raise the presumption of a special acceptance. *Ibid.*

25. The general liability of carriers is restrained only where the goods are found to have been delivered on the footing of a special contract. *Leeson* v. *Holt and others*, 1 Stark. 186. Ellenborough, C. J. 1816.

26. Such contract may be inferred from the circumstance of an advertisement being fixed in a situation which must, in all probability, have attracted the attention of the person who brought the goods. *Ibid.*

27. A notice that no more than 5*l.* will be accounted for any goods delivered at a coach-office, extends to the luggage of a passenger. *Clark* v. *Gray*, 4 Esp. 177. Ellenborough, C. J. 1802.

S. C. not S. P. 6 East, 564. And see *Upshare* v. *Aidee*, 1 *Comyns's Rep.* 25; *Middleton* v. *Fowler*, 1 Salk. 282; *Lovett* v. *Hobbs*, 2 Show. 127; *Robinson* v. *Dunmore*, 2 Bos. and Pul. 416, 9. Ante B. (b) 13.

28. A notice stuck up at the carrier's office is not sufficient to discharge him from the common law liability with respect to persons from whom he receives goods by carts which he sends round the neighbourhood. *Clayton, esq.* v. *Hunt*, 3 Campb. 27. Ellenborough, C. J. 1811, and K. B. M. 1811.

29. Nor can a carrier limit his responsibility by nailing upon the door of his office a hand-bill, stating, in large print, the advantages of his waggon, and in small characters at the bottom, that he will not be answerable for goods above the value of 5*l.* unless entered and paid for accordingly. *Butler* v. *Heane*, 2 Campb. 415. Ellenborough, C. J. 1810.

30. A carrier is responsible, unless express notice be brought home to the bailor. *Gouger* v. *Jolly*, Holt. 317. Gibbs, C. J. 1816.

31. A notice therefore, merely suspended at the termination of the journey, will not affect goods received at intermediate places. *Ibid.*

32. To limit responsibility, by a notice affixed in the office, the person delivering goods there must read it, or be informed of its import. *Ker* v. *Willan*, 2 Stark. 53. Ellenborough, C. J. 1817.

And see *Leeson* v. *Holt*, 1 Stark. 186. *Davis* v. *Same*, Id. 279.

33. Semble, that a vendor forwarding valuable goods by a carrier, who advertises, that he will not be answerable for any package above the value of 5*l.* unless entered and paid for accordingly, is not bound to enter and insure them; and that the purchaser would not be liable for such an unusual expense. *Cothey and others* v. *Tute and another*, 3 Campb. 129. Ellenborough, C. J. 1811.

Sed vide *Clarke* v. *Hutchins*, 14 East, 475.

34. And where it appears from the terms of the order, that other goods have been forwarded to the parties by the same conveyance, the vendor is clearly not liable for a loss, unless the purchaser can shew that the former parcel was entered and insured. *Ibid.*

35. An exception of "perils of the sea," extends to a loss arising from the vessel's running foul of another by misfortune. *Buller and others* v. *Fisher and others*, 3 Esp. 67. Kenyon, C. J. 1799.

36. The property in goods shipped by order and for the account of the consignee, vests immediately in him; and he *alone* can sue for an injury which takes place after they are on board. *Brown and others* v. *Hodgson*, 2 Campb. 36. Ellenborough, C. J. 1809.

37. Although the consignee be resident in a foreign country. *Ibid.*

38. But where the bill of lading expressed that the freight had been paid by the shippers in London, it was held that they might maintain an action for

non-delivery. *Joseph and others*, v. *Knox*, 3 Campb. 320. Ellenborough, C. J.

39. A carrier who circulates hand-bills, wherein he refuses to be accountable for parcels beyond a certain value, must be taken to have expressed all the terms of the special contract, under which he receives goods. He cannot further restrict his liability by a board in his office. *Cobden* v. *Bolton*, 2 Campb. 108. Ellenborough, C. J. 1809.

And see *Nicholson* v. *Willan*, 5 East, 507.

40. Notices limiting the liability of carriers, must be understood to apply to packages, the value of which is peculiarly within the knowledge of the owner, not to casks, the contents of which are well known. *Beck and others*, v. *Evans and another*, 3 Campb. 267. Le Blanc, J. Shrewsbury, 1812.

41. But the usual notice exempts them from liability upon the loss of goods above the value of £5, notwithstanding the bulk of the package, unless the nature of the goods is known to the carrier, and is such as must necessarily exceed that value. *Down* v. *Fromont*, 4 Campb. 40. Ellenborough, C. J. 1814.

42. Nor does such a notice extend to cases of gross negligence. *Beck* v. *Evan, ubi supra.*

And the court of K. B. refused a rule for a new trial. *Ibid.* and 16 East, 244.

43. S. P. *Smith* v. *Horne and others*, Holt, 643. Dallas, J. 1817.

And see *Bodenham* v. *Bennett*, 4 Price, 31; *Birkett* v. *Willan*, 2 B. and A. 356.

44. Notice not to be answerable for *glass*, unless paid for as such when delivered. The book-keeper is told that a package contains glass, and that he may charge what he pleases, and payment is not demanded, the carrier is liable. *Wilson* v. *Freeman*, 3 Campb. 527. Ellenborough, C. J. 1814.

45. A carrier who affixes one notice in his counting-house and warehouse, and delivers another to a person who brings goods, is bound by that which is less beneficial to himself. *Munn* v. *Baker and another*, 2 Stark. 255. Ellenborough, C. J. 1817.

46. A promise made by the book-keeper to make compensation for the loss of a parcel is not binding upon the carrier, unless the book-keeper be his general agent. *Olive* v. *Eames*, 2 Stark. 181. Ellenborough, C. J.

47. Where a parcel delivered to a driver of a stage-coach is lost, the servant is not responsible to the owner of the parcel, unless he stipulates for a reward to be paid to himself. *Williams* v. *Cranston*, 2 Stark. 82. Ellenborough, C. J. 1817.

And see *Cavenagh* v. *Such*, 1 Price, 328.

48. If A. and B. are partners in a carrying concern, A. is liable for the misfeasance of a servant employed by B. on that part of the road, which by a subordinate contract was allotted to B. *Wyland* v. *Elkins*, Holt, 227. Gibbs, C. J. 1816.

49. A wharfinger who conveys goods from his wharf to vessels in the river in his own lighters, is liable as a common carrier. *Maving* v. *Todd and others*, 1 Stark. 72. Ellenborough, C. J. 1815.

S. C. not S. P. 4 Campb. 225.

50. The question always is whether the delivery has been upon a special contract; which is for the jury. *Leeson* v. *Holt*, 1 Stark. 186. Ellenborough, C. J. 1816.

51. Notice affixed in the office is not enough, where the porter who brings the goods cannot read. *Davis* v. *Willan*, Abbott, J. Sittings after Mich. Term, 1817.

52. An advertisement in a newspaper, or even in the Gazette, is not sufficient, without proving that the party is in the habit of reading it. *Leeson* v. *Holt*, *ubi supra.*

D. Pleadings.

(And see *Hutton* v. *Osborne*, B. R. M. 1729. Selw. N. P. 382. n.)

53. A misdescription of the termini in the contract of carriage is fatal. *Tucker* v. *Cracklin*, 2 Stark. 385. Abbott, J. 1818.

E. Evidence.

54. Semble, that no proof of non-arrival need be given. *Ibid.*

55. Carrier gives a receipt for a dog which is lost; it is no defence that the dog was not properly secured. *Stuart* v. *Crawley*, 2 Stark. 323. Ellenborough, C. J. 1818.

COMMON.

(And see WITNESS, C. (i).)

1. Evidence of user of right of common, confirmed by an acknowledgement of that right by the owner of the soil, is not impeached by shewing that the latter has from time to time been enclosed against the commoners. *Drury* v. *Moore*, 1 Stark. 102. Ellenborough, C. J. 1815.

CONDITIONS PRECEDENT.

A. WHAT SHALL BE.

B. HOW TO BE PERFORMED.

A. WHAT SHALL BE.

(And see ante, ACTION, E. ASSUMPSIT, B. *Needham* v. *Walmesley*, 5 Wentw. 356, 8.)

1. A stipulation in a charter party, that the captain shall sail with the first fair wind, is not a condition precedent to the right to freight. *Bornman* v. *Tooke*, 1 Campb. 377. Ellenborough, C. J. 1808.

2. And the non-compliance with such a stipulation, cannot be set up as an answer to an action of *indebitatus assumpsit* for the freight, or in mitigation of damages, but must be made the subject of a cross action. *Ibid.*

Acc. *Ritchie* v. *Atkinson*, 10 East, 295; *Davidson* v. *Gwynne*, 12 East, 381.

3. A stipulation that "as soon as the seller knows the name of the vessel in which the goods will be shipped, he is to mention it to the buyer," forms a condition precedent. *Busk* v. *Spence*, 4 Campb. 329. Gibbs, C. J. 1815.

4. Freighter engages to provide a cargo at A, in time for the July convoy, "provided she arrives out and is ready by the 25th of June." The arrival of the vessel by the 25th of June, is a condition precedent to the obligation to provide any cargo, and is not referred merely to the undertaking that it shall be loaded in time for the convoy. *Shadforth* v. *Higgin*, 3 Campb. 385. Ellenborough, C. J. 1813.

5. In an action upon the decree of a colonial chancery, by which the defendant is enjoined to pay the complainant a certain sum, "*first deducting thereout the defendant's costs to be taxed by the master*," such taxation is necessary to perfect the decree. *Sadler* v. *Robins*, 1 Campb. 253. Ellenborough, C. J. 1808.

And see *Hall* v. *Odber*, 11 East, 118, 21, 2.

B. HOW TO BE PERFORMED.

6. And if the defendant neglect to appear to tax the costs, the complainant must proceed in the taxation *ex parte*, in order to entitle himself to an action. *Sadler* v. *Robins*, *ubi supra*.

7. In an action for not accepting stock, agreed to be transferred, (*on request*) it was held, that it was not necessary to prove (*an actual tender and refusal, or*) that the vendor waited at the bank until the latest time at which the transfer could have been made; but that it was sufficient to shew a *reasonable* degree of promptness. *Bourdenave* v. *Gregory*, 5 Esp. 115. Ellenborough, C. J. 1804.

But the court of K. B. set aside a verdict for the plaintiff. *Ibid.* 117. 5 East, 107, S. C. 1 Smith, 306, S. C.

S. P. *Lancashire* v. *Killingworth*, 1 Lord Raym. 686. S. C. 2 Salk. 263. S. C. 3 Salk. 343. S. C. 12 Mod. 529. S. C. 1 Comyns's Rep. 116; *Maxwell* v. *Sharp*, Say. 187, 9. Wade's case, 5 Rep. 114, a. b.

8. Semble, that in such an action it is not necessary for the vendor to prove that he re-sold the stock to a stranger on the *next* transfer day. *Ibid.*

9. Where a vendor who engages to mention the name of the importing ship, as soon as he knows it, having advice of the name of the ship, in London, on the 12th, does not communicate it to the buyer, who resided at Hull, till the 20th, the condition is broken, and the buyer is released from the contract, though he has sustained no damage by the delay. *Busk* v. *Spence*, 4 Campb. 329. Gibbs, C. J. 1815.

COSTS.

A. Right to costs.

(a) *In criminal proceedings.*

(b) *In actions of trespass.*

(c) *In other cases.*

B. Liability to costs.

C. Remedy for costs.

A. Right to costs.

A. (a) *In criminal proceedings.*

1. Where, after a cause is called on, the defendant puts off the trial on account of the absence of witnesses, he must pay the costs of the day, as well in criminal cases as in civil. *Rex* v. *Doyle*, 1 Esp. 125. Kenyon C. J. 1790.

2. But the prosecutor is not entitled to his own personal costs, unless his name appear as a witness indorsed on the indictment; except in cases where costs are expressly given by statute. *Ibid.*

3. In criminal cases, the judge cannot certify for the costs of a special jury, under 24 Geo. 2, cap. 18, s. 1. *The King, on the prosecution of Sermon*, v. *Lord Abingdon*, 1 Esp. 226. Kenyon, C. J. 1794.

A. (b) *In actions of trespass.*

4. Held, that where an *asportavit* is proved, the plaintiff is entitled to full costs, though the articles have been brought back, and damages under 40*s*. are given for the expense incurred by the plaintiff in reinstating them. *Richardson* v. *Tomlin*, 1 Esp. 255. Eyre, C. J. 1794.

But the court of C. P. (Buller, J. only present) made a rule absolute upon the master, to allow no more costs than damages. *Ibid.*

Sed vide *Smith* v. *Clarke*, 2 Stra. 1130.; *Barnes* v. *Edgard*, 3 Mod. 39; *Knightly* v. *Buxton*, Say. Costs, 39; *Haines* v. *Hughes*, Comb. 324; *Milburne* v. *Read*, 3 Wils. 322, 3. S. C. Barnes, 134.

5. In an action for mesne profits, if the plaintiff recover less than 40*s*. he is entitled to no more costs than damages, unless the judge certify. *Doe* v. *Davis*, 1 Esp. 358. Kenyon, C. J. 1795.

And the court of K. B. discharged a rule for allowing full costs. 6 T. R. 593.

6. If A., one of several defendants, is proved to have been a party to a joint trespass, but is acquitted for the purpose of enabling the plaintiff to recover for another trespass, in which A. had no share, the judge will certify that there was a probable cause for making A. a defendant, to deprive him of costs under 8 and 9 Will. 3. cap. 11. *Aaron* v. *Alexander, Crowley, and Solomons*, 3 Campb. 35. Ellenborough, C. J. 1811.

7. So if A. commit a trespass for the use of B., this is a probable ground for joining B. *Furneaux* v. *Fotherby and Clarke*, 4 Campb. 136. Ellenborough, C. J. 1815.

A. (c) *In other cases.*

(And see post, Practice, F.)

8. Where an action, brought under an *implied* direction of the court of Chancery, is defeated by a formal objection, that court will oblige the defendant to pay all costs. *Wray, assignee, &c.* v. *Barwis*, Peake, 69. Kenyon, C. J. 1791.

9. Where, at a trial in England, upon a cause of action arising in Wales, the plaintiff recovers less than 10*l*. the judge is *bound* to certify, under 13 Geo. III. cap. 51. s. 2. *Cooper* v. *Davies*, 1 Esp. 463. Kenyon, C. J. 1795.

And see *Evans* v. *Jones*, 6 T. R. 500. *Davis* v. *Jones*, 2 N. R. 167.

10. In C. P. where the defendant applies to settle the action the day after that on which he is served with process, he is not liable for the costs of a declaration. *Charlwood et alt.* v. *Berridge*, 1 Esp. 345. Eyre, C. J. 1795.

Acc. *Golding* v. *Grace*, 2 Bla. 749; Cont. *Fawcett* v. *Christie*, 2 Bos. and Pul. 515, overruled by *Partington* v. *Williams*, 2 N. R. 399, acc. Tidd, 467.

11. Where the parties signed an unstamped agreement, and the plaintiff, before action brought, tendered to the defendant an engrossment, which the latter refused to sign; the judge directed that the master should be instructed

to include the expense of stamping the original agreement in the costs of the action. *Bowen* v. *Pitman, gent.* 2 Esp. 728. Kenyon, C. J. 1799.

12. A party who has obtained a *mandamus* to restore him to an office, cannot recover the costs of the application as consequential damages, in an action for the amotion. *Harman* v. *Tappenden*, 3 Esp. 278. Kenyon, C. J. 1801.

13. A judge cannot certify for the costs of the special jury, the day after the trial. *Waggett* v. *Shaw*, 3 Campb. 316. Ellenborough, C. J. 1812.

B. Liability to costs.

14. Bail to the sheriff are *primâ facie*, liable to attorney for costs of putting in bail to the action; not the principal. *Hector* v. *Carpenter*, 1 Stark. 190. Ellenborough, C. J. 1816.

C. Remedy for costs.

(And see Attorney, B. Conditions, Precedent, 5, 6.)

15. In an action upon the 28 Geo. III. cap. 52. s. 20 and 23. for the costs of a frivolous petition against the election of a member of parliament, the defendant's subscription to the petition need not be proved, as the petition could not have been received without it. *Cleveland* v. *Wilson*, Peake, 106. Kenyon, C. J. 1792.

See the Act, sect. 1.

16. It was also ruled, that no demand of the costs need be proved. *Ibid.*

Sed vide sect. 23.

17. After judgment by *default*, in ejectment, the costs may be recovered in an action for the mesne profits. *Doe* v. *Davis*, 1 Esp. 358. Kenyon, C. J. 1795.

Acc. *Gulliver* v. *Drinkwater*, 2 T. R. 261.

18. But where the ejectment is defended, and taxed costs are paid, the *extra* costs cannot be so recovered. *Ibid.*

19. Upon a petition to the chancellor against the allowance of a certificate, the petititioners were ordered to pay taxed costs. In an action against the petitioners for a conspiracy, the bankrupt cannot recover the costs of the petition, since the costs as between party and party must be considered as already paid; and the extra costs cannot be allowed, on account of the incongruity which would follow the adoption of a different standard, in the awarding of costs in the two courts. *Hathaway* v. *Burrow and others*, 1 Campb. 151. Mansfield, C. J. 1807.

And see *Winstanley* v. *Head*, 4 Taunt. 192.

20. If, after action brought, the defendant pays the debt without the knowledge of plaintiff's attorney, the action may be proved for the costs. *Toms* v. *Powell*, 6 Esp. 40. Heath, J. Kingston, 1806.

And a rule nisi for a new trial, on this ground, was refused in K. B., 7 East, 536, and 3 Smith, 554.

And see *Swain* v. *Senate*, 2 N. R. 99. *Chapman* v. *Haw*, 1 Taunt. 341.

21. Proof of the rule to pay money into court, entitles the plaintiff to a verdict with nominal damages, unless the costs have been paid. *Horsburgh* v. *Orme*, 1 Campb. 558. n. Ellenborough, C. J. 1809.

22. Where, after action brought, the debt is paid without a rule of court, the plaintiff is entitled to a verdict. *Atkinson* v. *Thornton*, 1 Campb. 559. Ellenborough, C. J. 1808.

COURTS.

(And see Jurisdiction.)

1. The chief justice of K. B. sitting at nisi prius *at Westminster*, cannot entertain a motion respecting a cause to be tried *in London*. Such an application must either be made to the court in term, to a judge at chambers, or to the chief justice *in London*. *Atkinson* v. *Dickinson*, 3 Campb. 41. Ellenborough, C. J. 1812.

And see post, Pleading, H. (b). Litt. Ent. 83.

COVENANT.

A. Operation of covenants.

(a) *Where binding.*

(b) *Where broken.*

(c) *Breach, where waved.*

B. To whom covenant extends.

(a) *To what covenantor.*

(b) *To what covenantee.*

C. Pleadings.

A. Operation of covenants.

A. (a) *Where binding.*

1. A covenant in a lease, "that the lessee shall insure and keep insured, the sum of 800*l.* at the least, in some sufficient insurance office within the cities of London or Westminster," is sufficiently certain. *Doe* d. *Pitt* v. *Shewin*, 3 Campb. 134. Ellenborough, C. J. 1811.

2. A covenant indorsed upon a deed after signing, but before sealing and delivery, is binding. *Lyburn* v. *Warrington*, 1 Stark. 163. Ellenborough, C. J. 1816.

A. (b) *Where broken.*

3. Where lessee covenants to pull down a wall for the purpose of enabling the lessor to make a road over part of the *demised premises*, but there is no reservation by the lessor of the *use* of such road, nominal damages only can be recovered for not pulling down the wall. *Good* v. *Hill, executrix of Gurney*, 2 Esp. 690. Kenyon, C. J. 1798.

4. A covenant to keep all the trees standing in an orchard, whole and undefaced, "*reasonable use and wear only excepted*," is not broken by cutting down trees past bearing, provided the landlord is likely to get back the premises at the end of the term in an improved condition. *Doe* d. *Jones and ux.* v. *Crouch*, 2 Campb. 449. Ellenborough, C. J. 1810.

Acc. Co. Litt. 53. n. 11.

5. Lessee covenanted to keep premises insured. He omitted to pay the premium till after the expiration of 15 days beyond the year, during which days of grace the insurance company hold themselves liable; but at the end of the month he paid the premium, which was accepted by the company, *as reviving the insurance from the former year.* Held, that the covenant was broken, the premises having in fact remained uncovered from the expiration of the 15 days to the time the premium was paid. *Doe* d. *Pitt* v. *Shewin*, 3 Campb. 137. Ellenborough, C. J. 1811.

6. Lessee having covenanted to keep 800*l.* insured on the premises, effects an insurance containing a memorandum, that in case of the death of the assured the policy may be continued to his personal representative, provided an indorsement to that effect be made upon it within three months after his death; lessee dying, an indorsement continuing the policy to his personal representative, was made *after the expiration of the three months*, held no breach. *Doe* d. *Pitt* v. *Laming, widow*, 4 Campb. 73. Ellenborough, C. J. 1814.

7. Freighter covenants to load at Tobago in time for the West India convoy, which will sail for England on the 31st of August. The convoy calls off Tobago on the 22d July, before which time the freighter might have completed the cargo,—he is liable for dead freight. *Thompson* v. *Inglis and another*, 3 Campb. 428. Ellenborough, C. J. 1813.

8. The continuing of a doorway broken through the wall of the premises demised, into an adjoining house, amounts to a breach of covenant to keep in repair. *Doe* d. *Vickery* v. *Jackson*, 2 Stark. 293. Ellenborough, C. J. 1817.

9. A landlord covenanting to pay land tax. is only bound to pay it in proportion to the rent. *Whitfield* v. *Brandwood*, 2 Stark. 453. Abbott, C. J. 1818.

10. A covenant to yield up in repair all buildings and improvements erected during the term, is broken by the removal of a veranda, the lower part of which is attached to posts fixed in the ground. *Penny* v. *Brown*, 2 Stark. 403. Abbott, C. J. 1818.

A. (c) *Breach, where waved.*

11. *It is stated to have been held*, that the acceptance of rent which accrued subsequently to a forfeiture, incurred by not repairing within three months after notice, was not an absolute waver.

Fryet d. *Harris* v. *Jeffreys*, 393. Kenyon, C. J. 1795.

Cont. *Greene's* case, 1 Leon. 263. S. C. Cro. El. 3. *Fox* v. *Swann*, Sty. 482, 3; *Doe* v. *Batten*, Cowper, 244, 6, 7; *Goodright* v. *Davis*, *ibid.* 803; *Roe* v. *Minshal*, Bull. N. P. 96. S. C. Selw. 677.

N. In this case the rent due at Michaelmas, was received 18th Oct. and the demise laid 2d Nov., when the premises were still out of repair. Qu. whether the decision did not proceed upon the usual clause of re-entry, for not *keeping* the premises in repair *generally*?

B. To whom covenant extends.

(And see post, Deed, B. (b) 4. Ejectment, A. (b).)

B. (a) *To what covenantor.*

12. Qu. whether a covenant contained in the assignment of a lease, requiring the assignee and *his assigns*, to buy the beer of the assignor, will bind a subsequent assignee? *Hartley* v. *Pehall*, Peake, 131. Kenyon, C. J. 1792.

And see Agreement, C. (a)

N. That such a covenant is merely personal, see *James* v. *Blunck*, Hardres, 88. But see *Purfrey's* case, Moore, 243, pl. 382.

13. The assignees of a bankrupt termor, are not liable to the performance of covenants, unless they take possession. *Bourdillon* v. *Dalton et alt.* Peake, 238, and 1 Esp. 233. Kenyon, C. J. 1794.

Acc. *Turner* v. *Richardson*, 7 East, 339. S. C. 3 Smith, 330. And see Doct. and Stud. dial 2, cap. 33. *Helier* v. *Casebert*, 1 Lev. 127; *Billinghurst* v. *Speerman*, 1 Salk. 297; *Buckley* v. *Pick*, *ibid.* 317. Post. Deed, 11.

14. Merely omitting to deliver up the key, does not amount to taking possession. *Wheeler* v. *Bramah and others*, 3 Campb. 340. Ellenborough, C. J. 1813.

15. Nor a payment of rent made for the express purpose of avoiding a distress to which the effects of the bankrupt are liable. *Ibid.*

16. Where lessee devises his term to A., in trust to permit B. to receive the rents and profits, *durante viduitate*, B. is not chargeable as assignee. *Averhill* v. *Holmes*, Peake's Evid. 304. Lawrence, J. Worcester, 1805.

And see *Mayor of Carlisle* v. *Blamire*, 8 East, 487.

B. (b) *To what covenantee.*

17. Where premises are on lease, the tenant for life of the reversion can only recover such damages for not repairing as are commensurate with the injury done to his life estate. *Evelyn et ux.* v. *Raddish and others*, Holt, 543. Gibbs, C. J. 1817.

S. C. not S. P. 7 Taunt. 411.

C. Pleadings in covenant.

18. If a declaration in covenant, set out part only of an indenture, the plaintiff is not intitled to read the remainder, without proving the deed in the usual manner, though there be no plea of *non est factum*; the confession implied in the special plea, extending only to so much of the instrument as appears upon the record. *Williams* v. *Sills*, 2 Campb. 519. Ellenborough, C. J. 1810.

Acc. *Edwards* v. *Stone*, 1 Saund. 58. d. Sed vide post, Inquiry, 1, 2.

19. In an action by the assignee of a lease against the assignor, evidence of the execution of the assignment, in which the original lease is adopted, renders any further proof of the latter instrument unnecessary. *Nash* v. *Turner*, 1 Esp. 217. Kenyon, C. J. 1794.

Sed vide *Crosby* v. *Percy*, 1 Taunt. 364, 6.

20. Where an indenture is executed by one party only, that party cannot sue the other *upon the deed*, but must bring *assumpsit*. *Sutherland* v. *Lishnam*, 3 Esp. 42. Eldon, C. J. 1799.

And see *Soprani* v. *Skurro*, Yelv. 18, 19. Ante, Action, D. (b).

CUSTOM.

1. A person renting a stall in the parish of A., which he uses *occasionally*, may justify under an easement claimed

by the *inhabitants* of A. *Fitch* v. *Fitch*, 2 Esp. 543. Heath, J. Chelmsford, 1797.

2. A plea justifying under a custom for the tenants of a *particular* copyhold estate, to cut turf, &c. is not supported by evidence of a custom embracing the copyholders of the manor *generally*. *Wilson* v. *Page*, 4 Esp. 71. Kenyon, C. J. 1801.

And see PLEADING, C. 1. *Barnes* v. *Mawson*, 1 M. and S. 77.

3. A custom in a manor lying within a royal forest, for the lord, with the assent of the homage, to grant part of the waste in severalty, in exclusion of the commoners, is good. *Boulcott* v. *Winmill*, 2 Campb. 261. Macdonald, C. B. Chelmsford, 1809.

And the court of K. B. refused a rule for a new trial, M. 50. Geo. 3. *Ibid.*

DEBTOR AND CREDITOR.

A. DEBT, HOW CREATED.

B. HOW DISCHARGED.

C. PAYMENTS, HOW MARSHALLED.

A. DEBT, HOW CREATED.
(And see AGENT, C. (a).)

1. A. borrows money of B., and delivers the amount to C. The law presumes that this was done in satisfaction of a debt from B. to C., and not by way of loan to the latter. *Welsh and another, assignees of Evan Evans*, v. *Seaborn*, 1 Stark. 474. Ellenborough, C. J. 1816.

Acc. *Aubert* v. *Walsh*, 4 Taunt. 293.

B. DEBT, HOW DISCHARGED.
(Ante, BOND, C.)

2. Where a debtor, by the direction of the creditor, remits money by the post, whereby the money is lost, the creditor must bear the loss. *Warwicke* v. *Noakes*, Peake, 67. Kenyon, C. J. 1791.

3. But the debtor is not discharged by delivering the letter to a bell-man in the street. *Hawkins and others* v. *Rutt and another*, Peake, 186. Kenyon, C. J. 1793.

4. Where, in action for goods sold, the defence is a composition with creditors, and assignment of property, with clause to release on property realizing a certain sum, if the property assigned fall short of that sum, the plaintiff may recover the full amount of his debt. *Wigglesworth* v. *White et ux.* 1 Stark. 218. Ellenborough, C. J. 1816.

5. A debt of 1000l. is extinguished by a *gift* of 20,000l. stock by the debtor to the creditor. *Breton* v. *Cope, executor*, Peake, 30. Kenyon, C. J. 1791.

6. A creditor who borrows money of his debtor, under an express promise of repayment, may nevertheless retain the amount in satisfaction of his original debt. *Lechmere* v. *Hawkins, gent.* 2 Esp. 226. Kenyon, C. J. 1798.

And see *Preston* v. *Shutton*, 1 Anst. 50.

7. A., in the country, directs B. to pay money into a London banking-house, for A.'s account; A. has no account with the house, but through C., a country banker: a payment to the credit of A.'s account with C. discharges B. *Breed and others* v. *Green and another*, Holt, 204. Le Blanc, J. Lancaster, 1816.

C. PAYMENTS, HOW MARSHALLED.
(Ante, BOND, 16.)

8. Obligor becomes indebted to obligee in a further sum by simple contract, and pays money without directing the application of it. This must be taken to be a payment on account of the bond, it being the older debt. *Dawe and others* v. *Holdsworth and others*, Peake, 64, 5. Kenyon, C. J. 1791.

And see *Anon.* Cro. Eliz. 68; *Bois* v. *Cranfield*, Style, 239; *Meggot* v. *Mills*, 1 Lord Raym. 286, 7; *Anon.* Comb. 463; *Pinnel's* case, 5 Co. Rep. 117. b. Ca. Temp. King, 41; *Stracey* v. *Saunders*, 7 Mod. 123; *Colt* v. *Netterwill*, 2 P. Wms. 308; *Goddan* v. *Cox*, B. N. P. 274; *Morgan* v. *Jones*, 1 Bro. P. C. 32; *Newmarch* v. *Clay*, 14 East, 240; *Clayton's* case, in *Devaynes* v. *Noble*, 1 Meriv. 585; *Bodenham* v. *Purchas*, 2 B. and A. 39. 16 Vin. Abr. Payment M. passim.

9. But the circumstance of discount being claimed and allowed for prompt payment, is evidence of an appropriation to a recent debt. *Marryatts* v. *White*, 2 Stark. 101. Ellenborough, C. J. 1817. 16 Vin. Abr. Payment M. passim.

10. A payment made to a creditor generally, must be taken to be a payment on account of the subsisting debt. It will, therefore, operate as a discharge of sureties *pro tanto;* and cannot be set by the creditor against a subsequent debt. *Hammersley et alt.* v. *Knowlys, esq.* 2 Esp. 666. Kenyon, C. J. 1798.

11. So if A. accept a bill for the accommodation of B., which B. discounts with his bankers, who, after the bill has been dishonoured, and after they have notice of the want of consideration, receive money on account of B., exceeding the amount of the bill, A. is discharged. *March and another* v. *Houlditch*, Chitty on Bills, 370. Abbott, J. 1818.

12. A. having a legal demand against B., and claiming also to be the equitable assignee of a debt due from B. to C., receives money from B. on account, *without prejudice to such claim.* The payment must be applied to the legal debt. *Birch and another* v. *Tebbutt*, 2 Stark. 74. Ellenborough, C. J. 1817.

Acc. *Taylor* v. *Okey*, 13 Ves. 180. *Eland* v. *Karr*, 1 East, 375.

Sed vide *Fair* v. *M'Iver*, 16 East, 130. Post, Pleading, C. (b)

DEED.

A. What shall be.

B. Execution.

(a) *Ability of parties.*

(b) *Conditional execution.*

(c) *Irregular execution.*

C. How construed.

A. What shall be.

(And see Covenant, A. (a) 2.)

1. An agreement to which seals are affixed contrary to the original intention of the parties, need not be declared upon as a specialty. *Clement* v. *Gunhouse*, 5 Esp. 83. Chambre, J. 1803.

And see Plowd. 14. post, C. 15.

B. Execution.

B. (a) *Proof of execution.*

2. On *non est factum* pleaded, it is not sufficient to prove an execution by a person who executed in the name of the defendant, without proof of identity. *Parkins* v. *Hawkshaw*, 2 Stark. 239. Holroyd, J. 1817.

3. The execution of a deed is not impeached by the attesting witness saying that he does not know whether the blanks were filled up at the time, or not. *England* v. *Roper*, 1 Stark. 304. Ellenborough, C. J. 1816.

B. (b) *Ability of parties.*

4. A release by one of several assignees of a bankrupt's estate, executed in the presence of the others and with their concurrence, binds all. *Williams* v. *Walsby*, 4 Esp. 220. Ellenborough, C. J. 1802.

Acc. *Lord Lovelace's* case, W. Jones, 268. *Ball* v. *Dunsterville*, 4 T. R. 313.

And see *Anon.* cited in 2 Freeman, 215, by the M. R. Co Litt. 231. a.

5. And parol evidence of the presence and concurrence of the non-executing assignees, is admissible. *Ibid.*

6. But where one of the co-assignees is absent, he cannot be bound without an authority under seal. *Ibid. Harrison* v. *Jackson*, 7 T. R. 207. acc.

7. Coverture may be given in evidence under *non est factum*. *Lambert* v. *Martha Atkins and another*, 2 Campb. 272. Ellenborough, C. J. 1809.

Anon. per Holt, C. J. 12 Mod. 609, accord. S. P. adm: 3 Keb. 228, *Cole* v. *Delawn*.

8. Although defendant has executed deeds, and maintained actions as a feme sole; *Davenport* v. *Nelson, widow*, 4 Campb. 26. Ellenborough, C. J. 1814.

9. Or lunacy. *Faulder* v. *Silk and another, executors of Jervoise*, 3 Campb. 126. more fully reported, 1 Collinson, 390. Ellenborough, C. J. 1811.

B. (c) *Conditional execution.*

10. Under *non est factum*, delivery as an escrow, may be given in evidence. *Stoytes* v. *Pearson*, 4 Esp. 255. Ellenborough. C. J. 1803.

S. P. *Coles* v. *Robins*, B. N. P. 172. *Bushell* v. *Pasmore*, 6 Mod. 217.

And see Sav. 71. pl. 148.

11. A., assignee of a term, executes an assignment which remains in the hands of his attorney, who has a lien thereon for his charges, A. is not liable for the subsequent arrear of rent. *Odell* v. *Wake and another*, 3 Campb. 394. Ellenborough, C. J. 1813.

B. (d) *Irregular execution.*

12. A bail bond, sealed and delivered when only the penal part is filled up, is void, *quoad* the condition for appearance inserted afterwards. *Powell, assignee, sheriff of Middlesex*, v. *Duff*, 3 Campb. 181. Ellenborough, C. J. 1812.

Acc. *Shelden* v. *Hentley*, 2 Show. 160, 1. Com. Dig. Fait. A. 1. *Weeks* v. *Maillardet*, 14 East, 568. And see ante, B. (a) 3.

13. But where A. executed a bond, leaving blanks for the sum and the name of the obligee, which were filled up by the agent employed to raise an indefinite sum on the security, it was held to be a good deed. *Texira* v. *Evans*, cited 1 Anstr. 228. Lord Mansfield, C. J.

And see Keilw. 162, a. 164, 5.; *Anon.* Moore, 43. pl. 132; *Sams* v. *Pitt*, *ibid.* 359. S. C. 5 Co. 77. b. 78. a. S. C. Cro. El. 432. 11 Co. 27. *Pigott's* case, 2 Roll. Abr. 29. pl. 7.; *Zouch* v. *Clay*, 1 Vent. 185; *Lady Cook* v. *Remington*, 8 Mod. 237; *Paget* v. *Paget*, 2 Cha. Rep. 410: *Oakley* v. *Davis*, 16 East, 82, 4. Post. Pleading, H. (b) 17. 4 Vin. Abr. Blanks.

14. A subsequent acknowledgment of an authority to a copartner to execute a deed, does not dispense with the production of the power of attorney. *Steiglitz and another* v. *Egginton and another*, Holt. 141. Gibbs, C. J. 1815.

15. Assumpsit does not lie on an instrument under seal produced by the plaintiff, and proved to have been signed by the defendant. *Barber* v. *Sargent*, MSS. Burrough, J. Bodmin, 1817.

C. How construed.

16. A. and B. are tenants in common; A. devises to B. and C. in trust, B. conveys his undivided moiety in mortgage to C., but the deed contains subsequent general words, assigning all B.'s title at law and in equity. The latter words are referable only to B.'s moiety, and not to the trust estate. *Doe* d. *Raikes* v. *Anderson*, 1 Stark. 155. Ellenborough, C. J. 1816.

DEFAMATION.

A. Words which slander a man in his profession.

B. Words of felony.

C. Words not imputing a legal crime.

D. Words spoken on a lawful occasion.

E. Pleadings and evidence.

A. Words which slander a man in his profession.

(And see Justices. C. (b).)

1. To say of an attorney, "He deserves to be struck off the roll," is actionable. *Phillips, gent.* v. *Jansen*, 2 Esp. 624. Kenyon, C. J. 1798.

2. But to say, "I have taken out a judge's order to tax A.'s bill—I will bring him to book and have him struck off the roll," is not actionable. *Ibid.*

Sed vide *Trowbridge* v. *Hard*, Latch. 320.

3. To say of a tradesman, "He lives by swindling and robbing the public," is actionable; though the transaction alluded to amount only to a fraud. *Smith* v. *Carey*, 3 Campb. 461. Ellenborough, C. J. 1813.

4. But, in such case, the words must not be laid, innuendo "that the plaintiff was guilty of felony and robbery." *Ibid.*

B. Words of felony.

5. A. calls B. a thief, but expressly alludes to a transaction which amounts only to a breach of trust. No action will lie. *Thompson* v. *Bernard*, 1 Campb. 48. Ellenborough, C. J. 1807.

6. So if it appear that the words were spoken with reference to a mere breach of contract. *Cristie* v. *Cowell*, Peake, 4. Kenyon, C. J. 1790.

Acc. *Robins* v. *Hildredon*, Cro. Jac. 65. And see *Minors* v. *Leeford*, *ibid.* 114. Bull. N. P. 5. *Tibbs* v. *Smith*, T. Raym. 33.

C. Words not imputing a legal crime.

7. Semble, that words which merely charge the party with evil *inclinations*, are not actionable. *Harrison* v. *Stratton*, 4 Esp. 218. Ellenborough, C. J. 1803.

And see *Snag* v. *Gee*, 4 Rep. 16, a. Bull. N. P. 5. Doctor and Student, Dial. 2. cap. 41. *Anon.* T. Raym. 20.

D. Words spoken on a lawful occasion.

(And see Libel, A. (a), (b).)

8. Words spoken on giving a party in charge to a constable, or in preferring a complaint to a magistrate, are not actionable. *Johnson* v. *Evans*, *clerk*, 3 Esp. 32. Eldon, C. J. 1799.

And see *Anon.* Dyer, 285. a. But an action lies "for imposing the crime of felony." *Saunders* v. *Edwards*, 1 Sid. 95; *Anon.* 1 Vent. 264; *Wood* v. *Brown*, 1 Marsh. 522. 6 Taunt. 169.

9. An action does not lie against a man who, upon reasonable grounds of suspicion, charges an innocent person with a theft. *Fowler and wife* v. *Homer*, 3 Campb. 294. Ellenborough, C. J. 1812.

Sed vide *Adams* v. *Moore*, Selw. 830. And see ante, Action on the case, A. (g) 45, A. (h).

10. An action will not lie for information given by the serjeant of a volunteer corps to the committee of management, that the plaintiff is an improper person to remain a member of their corps. *Barbaud* v. *Hookham*, 5 Esp. 109. Ellenborough, C. J. 1804.

11. A having summoned B., his master, before a court of conscience for wages, B. there utters words imputing felony to it. If this charge be necessary to B.'s defence, no action lies. *Trotman* v. *Dunn*, 4 Campb. 211. Ellenborough, C. J. 1815.

And see *R.* v. *Creevey*, 1 M. and S. 273.

E. Pleadings and evidence.

12. In an action for words charged only once in a declaration, containing but one count, evidence may be given of the same words having been spoken on different occasions. *Charlter, one, &c.* v. *Barrett*, Peake, 22. Kenyon, C. J. 1790.

13. A count for slander, where the obnoxious words contain distinct charges, is supported by proof of words conveying any one of such charges. *Flower* v. *Pedley*, 2 Esp. 491. Eyre, C. J. 1796.

14. But if the unproved words affect and modify those which are proved, the variance is fatal. *Ibid.*

DISTRESS.

A. For rent.

(a) *What may be taken.*
(b) *In what place.*
(c) *How dealt with.*
(d) *Remedy of distreinee.*
(e) *Excessive distress.*

B. For damage feasant.

(a) *At what time.*
(b) *Remedy of distreinee.*

A. For rent.

A. (a) *What may be taken.*

1. Wearing apparel not in actual use, may be distrained for rent. *Bisset* v.

Caldwell, Peake, 36, and 1 Esp. 206. Kenyon, C. J. 1791.

2. S. P. ruled in *Baynes* v. *Smith*, 1 Esp. 206. Kenyon, C. J. 1794.

And see *Hardistey* v. *Barney*, Comb. 356. *Simpson* v. *Hartopp*, Willes, 512. *Gorton* v. *Falkner*, 4 T. R. 565.

A. (b) *In what place.*

3. Goods removed for the purpose of avoiding a distress for rent, cannot be followed by the landlord under 11 Geo. 2. cap. 19. s. 1 and 2. unless the rent is in arrear at the time of the removal, *and* the goods are conveyed away in a clandestine manner. *Watson* v. *Main*, 3 Esp. 15. Eyre, C. J. 1799.

4. S. P. doubted. *Furneaux* v. *Fotherby and Clarke*, 4 Campb. 136. Ellenborough, C. J. 1815.

And see 2 Saund. 284. n. 2. Bradby on Distresses 138. MSS. D. 54. Post, PENAL ACTION.

5. In trespass, a distress after a clandestine removal cannot be given in evidence under the general issue. *Ibid.*

A. (c) *How dealt with.*

6. Distress must not be appraised by party making it. *Westwood* v. *Cowne* 1 Stark. 172. Ellenborough, C. J. 1816.

A. (d) *Remedy of distreinee.*

(And see ante, ACTION, E. (f) 76, 77. Post, PENAL ACTION, B.)

7. An overpayment of rent under a distress cannot be recovered in an action for money had and received. *Knibbs* v. *Hall*, 1 Esp. 84. Kenyon, C. J. 1794.

Recognized in *Lothian* v. *Henderson*, 3 Bos. and Pul. 530. S. P. *Lindon* v. *Hooper*, Cowp. 414. in the case of a distress damage feasant. And see Fitz. Avowry, 130.

A. (e) *Excessive distress.*

12. In an action on the case for an excessive distress, express malice need not be proved. The excess, however, must be considerable. *Field* v. *Mitchell*, 6 Esp. 71. Ellenborough, C. J. 1807.

B. FOR DAMAGE FEASANT.

B. (a) *At what time.*

13. To justify the taking of cattle damage feasant, it is necessary and *sufficient* that the distreinor should have entered the locus in quo whilst the cattle were in it. *Clement* v. *Milner, et alt.* 3 Esp. 95. Eldon, C. J. 1800.

Sed vide Co. Litt. 161. a.

B. (b) *Remedy of Distreinee.*

(And see ante A. (d) 7. ACTION, E. (f) 76, 77. Post, PENAL ACTION, B.)

14. An action on the case will not lie for detaining the plaintiff's cattle in the pound, after tender of amends made subsequently to the impounding. *Anscombe* v. *Shore*, 1 Campb. 285. Mansfield, C. J.; and C. P. 1808.

Acc. 8 Co. 146. a.

15. Nor where the tender is made after the distress and before the impounding, the proper remedy in the latter case being replevin or trespass. *Ibid.*

Acc. *Lindon* v. *Hooper*, Cowp. 411. And see *Shipwick* v. *Blanchard*, 6 T. R. 299.

DONATIO MORTIS CAUSA.

1. The donee must have immediate possession of the gift, and uncontrolled dominion over it. *Hawkins, adm.* v. *Blewitt*, 2 Esp. 663. Kenyon, C. J. 1798.

Acc. *Smith* v. *Smith*, 2 Stra. 955.

Cont. Vinn. Inst. Imp. Com. lib. tit. 7. p. 228, 9.

2. Therefore if the donor command a person to put some securities into paper, and direct the paper to the donee, and charge him to deliver it to the donee after his death, and in the mean time to deposit it in a chest of which the donor keeps the key, nothing passes by the gift. *Bunn and another* v. *Mackham and wife*, Holt. 352. Gibbs, C. J. 1816.

And the court of C. P. set aside a nominal verdict for the plaintiff. *Ibid.*

4. But semble, that if the donor say to the donee, "fetch it away and I will make you a present of it," the property passes. *Spratley* v. *Wilson, knt.* Holt. 10. Gibbs, C. J. 1815.

And see *Drury* v. *Smith*, 1 P. Wms. 404; *Lawson* v. *Lawson*, *ibid.* 441. *Miller* v. *Miller*, 3 P. Wms. 357, 358; *Jones* v. *Martin*, 3 Anst. 882.

ECCLESIASTICAL COURTS.

1. The law and practice of the ecclesiastical court, are matters of fact, to be proved by witnesses. *Beaurain*, *gent.* v. *Sir Wm. Scott*, 3 Campb. 388. Ellenborough, C. J. 1813.

Acc. *Crogate's* case, 1st resolution, 8 Co. 67, a. And see *Bushell's* case, Vaughan, 143.

EJECTMENT.

A. TITLE OF LESSOR.

(a) *Sufficient.*

(b) *How proved.*

B. DEMISE,

(a) *Time of demise.*

(b) *Form of demise.*

(c) *Actual, when to be proved.*

C. PREMISES, HOW DESCRIBED.

(a) *Situation.*

D. POSSESSION OF DEFENDANT.

E. ACTION FOR MESNE PROFITS.

(a) *What recoverable in.*

(b) *Evidence in.*

A. TITLE OF LESSOR.

A. (a) *Sufficient.*

And see ante, DEED, C. post, INFANT, A. (a) 1. LANDLORD AND TENANT, D.

1. *It is stated to have been held*, that the acceptance of rent which accrued subsequently to a forfeiture, incurred by not repairing within three months after notice, is not an absolute waver. *Fryett* d. *Harris* v. *Jeffreys*, 1 Esp. 393. Kenyon, C. J. 1795.

Sed vide contra *Greene's case*, 1 Leon, 263. S. C. Cro. Eliz. 3. *Fox* v. *Swann*, Styles, 482, 3; *Doe* v. *Batten*, Cowp. 243, 6, 7; *Goodright* v. *Davids*, *ibid.* 803; *Roe* v. *Minshal*, Bull. N. P. 96. S. C. Selw. 677.

N. In this case the rent to Michaelmas was received on the 18th of Oct. and the demise laid on the 2d Nov. when the premises were still out of repair. Qu. Whether the decision did not proceed upon the usual clause of re-entry, for not keeping the premises in repair *generally;* vide post, s. 5.

2. Held, that an encroachment made by a tenant, upon a common adjoining the demised premises, does not enure to the benefit of the lessor. *Doe* d. *Colclough* v. *Mulliner*, 1 Esp. 460. Kenyon, C. J. Stafford, 1795.

3. S. P. ruled contra. *Doe* d. *Challnor* v. *Davies*, 1 Esp. 461. Thomson, B. Shrewsbury, 1795.

Acc. *Bryan* v. *Winwood*, 1 Taunt. 208. And see F. N. B. 179, K. *Creach* v. *Wilmot*, 2 Taunt. 160, n.

4. Ejectment will lie upon a clause of re-entry, which by the agreement, under which the tenant is let into possession, is directed to be inserted in the lease. *Doe* d. *Oldershaw et alt.* v. *Breach*, 6 Esp. 106. Macdonald, C. B. Maidstone, 1806.

So ruled upon the authority of *Bromfield* v. *Smith*, 6 East, 530.

And see S. C. 2 Smith, 520. *Poole* v. *Bentley*, 12 East, 168; *Tempest* v. *Rawling*, 13 East, 18; *Doe* v. *Groves*, 15 East, 244; *Morgan* v. *Bissell*, 3 Taunt. 65.

5. In a lease containing the usual power of re-entry, the tenant covenants generally to keep the premises in repair; and it is further provided, that within three months after notice given by the landlord, the tenant shall repair the defects specified in such notice. A forfeiture incurred by a breach of the former covenant, is not waved by a notice given under the latter. *Roe* d. *Goatly* v. *Paine*, 2 Campb. 520. Ellenborough, C. J. 1810.

And see F. N. B. 179, M.

6. A defendant who has paid rent to the lessor of the plaintiff may shew that his landlord has sold his interest in the premises. *Doe* d. *Lowden* v. *Watson*,

2 Stark. 230. Ellenborough, C. J. 1817.

7. Agreement to sell or assign covenant by vendee, that on default in payment of any instalment of the purchase money, vendor shall not be compellable to assign. Vendee in possession makes default. He is thenceforth a mere tenant by sufferance. *Doe* d. *Moore* v. *Lawder*, 1 Stark. 308. Ellenborough, C. J. 1816.

8. Said to have been ruled that distress and continuance in possession might be a waiver of any forfeiture existing at the time of distress. *Doe* d. *Taylor* v. *Johnson*, 1 Stark. 411. Ellenborough, C. J. 1816.

N. This is not stated to have been a distress for rent accruing subsequently to the forfeiture and the fact may be inferred to be otherwise. And see *Zouch* d. *Ward* v. *Willingale*, 1 H. Bla. 311. F. N. B. 179. A.

9. So if the landlord bring an action for the subsequent rent and the tenant pay the amount into court. *Roe* d. *Crompton* v. *Minshal*, 2 Selw. 677.

A. (b) *How proved.*

(And see Use and Occupation.)

10. After proof of title in A., and possession down to 1814, the bare fact of possession by B. in 1815, will not raise the presumption, that B. is seized in fee. *Doe d. Pitcher* v. *Anderson and another*, 1 Stark. 263. Ellenborough, C. J. 1816.

11. A party claiming under a lease from mortgagor and mortgagee, cannot make out his case by shewing that the lease is lost, and producing the counterpart, and proving its execution by the lessee, without shewing that the original lease was executed by the mortgagee. *Doe d. Clark* v. *Trapaud*, 1 Stark. 281. Ellenborough, C. J. 1816.

12. A presumptive title to a waste, arising from the possession of adjoining closes, cannot be set up against positive acts of ownership exercised by the lord of the manor. *Curzon and another* v. *Lomax*, 5 Esp. 60. Ellenborough, C. J. 1803.

13. Where trustees are bound to convey, it will be presumed that a conveyance has been executed. *Doe* d. *Bowerman* v. *Sybourn*, 2 Esp. 499. Kenyon, C. J. 1796.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 7 T. R. 2.

14. But where no such presumption can be made, an ejectment on the demise of the *cestui qui trust*, cannot be supported. *Godfrey* d. ——— v. *Hudson*, 2 Esp. 499, n. Kenyon, C. J. 1788.

S. P. *Goodtitle* d. *Jones* v. *Jones*, 7 T. R. 47.

And see *Doe* d. *Shewen* v. *Wroot*, 5 East, 132. S. C. 1 Smith, 363; *Weakley* d. *Yea, bart.* v. *Rogers*, 5 East, 138; *Massey* v. *Touchstone*, 1 Ca. temp. Redesdale, 67. *Doe* v. *Lawrence*, 4 Taunt. 23.

15. A reversionary termor dies intestate pending the first lease; the title of the lessor of the plaintiff derived under such termor, must be considered, with reference to the statute of limitations, as accruing on the determination of the first lease, not on the subsequent taking out of letters of administration. *Fairclaim* v. *Little*, Burrough, J. Salisbury Summer Assizes, 1818.

16. The declarations of a person found in possession, are admissible to prove a breach of covenant by underletting. *Doe* d. *Hindly* v. *Rickarby*, 5 Esp. 4. Alvanley, C. J. 1803.

17. But it is not sufficient to prove that the defendant, a stranger, is found in possession, and has declared that the premises were demised to him by another stranger. *Doe* v. *Payne*, 1 Stark. 86. Ellenborough, C. J. 1815.

And see Evidence, G. (c) 5. H. (c) 12.

18. To prove the title of the lessor of the plaintiff, by his admission to a copyhold, it is not sufficient to shew that a person of that name was admitted without further evidence of identity. *Doe* d. *Hanson and others* v. *Smith and another*, 1 Campb. 196. Ellenborough, C. J. 1808.

And see *Doe* v. *Vernon*, 7 East, 8. S. C. 3 Smith, 6. *Hennel* v. *Lyon*, 1 B. and A. 182, *Peaceable* v. *Watson*, 4 Taunt. 16. Ante, Deed, B. (a) 2.

19. A party who came into possession under the lessor of the plaintiff, cannot object that the title of the latter is under

lease from the crown, whereof seventy years were unexpired; though in 1 Ann 1. c. 7. crown leases for more than fifty years or three lives, are void. *Doe* d. *Biddle* v. *Abrahams*, 1 Stark. 305. Ellenborough, C. J. 1816.

20. A., lessee under a void lease from tenant for life, pays rent to the remainderman; B. takes an assignment of the lease, with notice of such payment. Semble, that B. is estopped from disputing the title of the remainder-man. *Johnson* v. *Mason*, 1 Esp. 89. Kenyon, C. J. 1794.

21. In ejectment by assignee of a term conveyed to secure an annuity, a regular memorial will be presumed. *Doe* d. *Griffin* v. *Mason*, 3 Campb. 7. Ellenborough, C. J. 1811.

22. In ejectment by an executor, the defendant's answer in chancery, admitting "that he believed that the testator was *possessed* of the *leasehold* premises mentioned in the bill," is evidence that the testator had an interest which would vest in the lessor of the plaintiff. *Doe* d. *Digby* v. *Steel*, 3 Campb. 115. Ellenborough, C. J. 1811.

S. C. not S. P. Adams, Ej. 141.

23. Held that a party claiming as vendee of sheriff under a *fi. fa.* must prove the *judgment*. *Hoffman, assignee of Phelps*, v. *Pitt*, 5 Esp. 22. Ellenborough, C. J. 1803.

24. It was held, however, that even where the lessor of the plaintiff claimed as a purchaser from the sheriff selling under a *fieri facias* at the suit of such lessor, it was enough to prove the writ. *Doe dem. Bland* v. *Smith*, 2 Stark. 199, Holt, 589. Wood, B. York Summer Assizes, 1817.

But the court of K. B. set aside a verdict which had been taken for the plaintiff. *Ibid.*

And see Gilb. Ev. 33. *Martin* v. *Podger*, 5 Burr. 2631. S. C. 2 Bla. 791. *Savage* v. *Smith*, 2 Bla. 101, 4.

25. Submitting to a distress is an admission of the landlord's title. *Panton, widow*, v. *Jones*, 3 Campb. 372. Bayley, J. Gloucester, 1813.

And see Use and Occupation, Co. Litt. 320, a. *Dixon* v. *Harrison*, Vaugh. 39.

26. Assignee of reversion may make title by receipt of rent without proving an assignment. *Doe* v. *Parker*, Peake's Evidence, 304. Kenyon, C. J. Stafford, 1788.

B. Demise.

B. (a) *Time of demise.*

(Sav. 28. pl. 46.)

27. In a lease containing the usual clause of re-entry, the lessee covenants *generally* to keep the premises in repair; and it is further provided, that within three months after notice he shall repair the defects pointed out in such notice. The demise may be laid before the expiration of the three months. *Roe* d. *Goatly* v. *Paine*, 2 Campb. 520. Ellenborough, C. J. 1810.

And see *Horsfall* v. *Testar*, 7 Taunt. 385. 1 Moore, 89.

28. A receipt for rent up to a particular day is *primâ facie* evidence of the commencement of the tenancy at that time of the year. *Doe* d. *Castleton and others* v. *Samuel*, 5 Esp. 173. Ellenborough, C. J. 1804.

29. But this presumption may be rebutted, by shewing that the tenant has held on after the expiration of an old term, which commenced at a different period. *Ibid.*

Acc. *Doe* v. *Lea*, 11 East, 312.

30. After the expiration of notice to quit the glebe a sequestration is published. A demise by the rector laid on a day subsequent to the expiration of the notice, and preceding the publication is good, though the bishop had previously indorsed the writ "Let sequestration issue." *Doe* d. *Morgan, clerk*, v. *Bluck*, 3 Campb. 447. Ellenborough, C. J. 1813.

B. (b) *Form of demise.*

31. Under a demise of the whole, an undivided moiety may be recovered. *Doe d. Bryant et alt.* v. *Wippel*, 1 Esp. 360. Kenyon, C. J. 1795.

S. P. Sav. 27, pl. 65.

32. Ejectment lies on the *several* demises of *joint* tenants. *Doe* d. *Lulham and others* v. *Fenn*, 3 Campb. 190. Ellenborough, C. J. 1812.

And see *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120; *Roe* d. *Raper* v. *Lonsdale*, 12 East, 39; *Doe* d. *Marsack* v. *Read*, *ibid.* 57; *Doe* d. *Clark* v. *Grant*, *ibid.* 221, 3.

B. (c) *Actual demise, when necessary to be proved.*

33. Lessee of a corporation, &c. need not produce the deed of demise. *Furley* d. *Mayor, &c. of Canterbury* v. *Wood*, 1 Esp. 198. Kenyon, C. J. 1794.

C. Premises, how described.

C. (a) *Situation.*

34. Premises described in the declaration, as lying in *the united parishes of St. George the Martyr and St. George's, Bloomsbury*, are proved to be situated in *St. George's, Bloomsbury.* The variance is fatal, although the parishes were united by act of parliament, for the purpose of a joint provision for the poor. *Goodtitle* d. *Pinsent* v. *Lammiman*, 6 Esp. 128. 2 Campb. 274, S. C. Ellenborough, C. J. 1809.

D. Possession of defendant.

35. It is no objection to plaintiff's right to recover, that the defendant entered into possession originally as servant to another. *Doe d. Cuff* v. *Stradling*, 2 Stark. 187. Bayley, J. 1817.

And see *Doe* d. *James* v. *Staunton*, 2 B. and A. 371. S. C. 1 Chitty, 118.

36. Where a party is admitted to defend as landlord, the plaintiff must still prove that the person served with the declaration was tenant in possession at the time of such service. *Doe d. Turner* v. *Wallinger.* Holroyd, J. Dorchester Spring Assizes, 1819.

37. But the defendant is estopped by his rule, from denying that he stands in the relation of landlord to such tenant. *Ibid.*

38. Where a party defends as landlord, it must be shewn that he is in receipt of the rent and profits, or that the declaration was served on the tenant in possession. *Fenn and Phillips* v. *Cooke and another*, 3 Campb. 512. Ellenborough, C. J. 1814.

39. But proof of such service is sufficient without shewing any priority between the defendant and the tenant in possession. *Doe d. Scholefield and others* v. *Alexander*, 3 Campb. 516. Ellenborough, C. J. 1814.

40. To shew a house that is situate in the parish mentioned in the declaration, it is *primâ facie* evidence, that the place is watched by the watchmen of that parish. *Doe d. Gunson* v. *Welch*, 4 Campb. 264. Ellenborough, C. J. 1815.

41. But it is not sufficient, that upon inquiries made before bringing the ejectment, the neighbours stated that the house was within the parish. *Ibid.*

E. Action for mesne profits.
(And see Co. Litt. 55, b. *Ib.* n. 370. Y. B. M. 33 H. 6, fo. 46, pl. 30, 111.)

E. (a) *What recoverable in.*

42. If in this action the plaintiff recover less than 40*s.* he is entitled to no more costs than damages, unless the judge certify. *Doe* v. *Davis*, 1 Esp. 358. Kenyon, C. J. 1795.

And the court of K. B. discharged a rule for allowing full costs. 6 T. R. 593.

43. After judgment by default in ejectment, the costs of such judgment may be recovered in this action. *Ibid.*

Acc. *Gulliver* v. *Drinkwater*, 2 T. R. 261.

44. Where the ejectment is defended, and taxed costs are paid, the *extra* costs cannot be recovered in this action. *Ibid.*

E. (b) *Evidence.*

45. In an action against the landlord, it should be shewn, that he had notice of the proceedings in ejectment. *Hunter* v. *Britts*, 3 Campb. 455. Ellenborough, C. J. 1813.

46. But a subsequent promise to pay the rent and costs is sufficient. *Ibid.*

47. If the plaintiff has been let into possession by the defendant, the execution of a writ of possession need not be proved. *Calvart* v. *Horsfall*, 4 Esp. 167. Ellenborough, C. J. 1802.

And see *Thorp* v. *Fry*, Bull. N. P. 87. S. C. Selw. 722, n. F. N. B. 179, F. note (c). Siderf. 239.

ESCAPE.

A. VOLUNTARY.

(a) *What shall be.*

B. REMEDY BY ACTION.

(a) *Pleadings.*

(b) *Evidence.*

A. VOLUNTARY.

A. (a) *What shall be.*

1. B. being in custody at the suit of A. upon *joint* process against B. *and C.*, a rule is made for the discharge of B., entitled "A. against B." omitting C. A discharge under this rule is an escape. *White* v. *Jones, marshal of K. B.* 5 Esp. 161. K. B. T. T. 1804.

S. C. 5 East, 292, and 2 Smith, 77.

B. REMEDY BY ACTION.

B. (a) *Pleadings.*

2. Declaration for an escape states, that the original defendant was arrested, "under a writ indorsed for bail, by virtue of an affidavit now of record." This is made a material averment, and must be proved by the production of the affidavit. The production of the *writ* so indorsed, is not sufficient. *Webb* v. *Herne and Williams, sheriff of Middlesex*, 2 Esp. 671. Eyre, C. 1798.

And the court of C. P. refused a rule to set aside nonsuit. *Ibid.* and 1 Bos. and Pul. 281.

3. But such averment appears to be unnecessary. *Ibid.*

And see *Whiskard* v. *Wilder*, 1 Burr. 330, 2; *Hill* v. *Heale*, 2 New Rep. 196, 9, 201.

4. Declaration for an escape states, that the original defendant was arrested for goods sold. This averment is supported by evidence of an absolute contract for the sale of goods for ready money, though immediately followed by an agreement to take a bill at three months, which period had not expired when the process issued. *White* v. *Jones, marshal of K. B.* 5 Esp. 161. K. B. T. 1804.

5. It would be otherwise where the credit formed part of the original contract. *Ibid.*

6. Declaration avers, that I. S. was brought by *habeas corpus* before a judge of K. B. who committed him to the custody of the marshal, "as by the said writ of *habeas corpus*, and the return thereof, and the said commitment thereon *now remaining in this court*, more fully appears." The production of the writ from the king's bench prison, where it was filed, will not support the action. *Turner* v. *Eyles*, 5 Esp. 8. Alvanley, C. J. 1803.

And the court of C. P. discharged a rule for setting aside nonsuit. *Ibid.* and 3 Bos. and Pull. 456.

Sed vide *Wigley* v. *Jones*, 5 East, 440. S. C. 1 Smith, 458. 1 Saund. 39, n.

7. An escape is sufficiently shewn by the cepi corpus and non-appearance. *Fairlie* v. *Birch and another, sheriff of Middlesex*, 3 Campb. 397. Ellenborough, C. J. 1813.

B. (b) *Evidence.*

8. An acknowledgment of the debt by the original defendant, is sufficient to charge the sheriff. *Sloman, executrix,* v. *Herne, knt. et alt. sheriffs of London*, 2 Esp. 695. Kenyon, C. J. 1798.

9. So any evidence which would be sufficient to charge the original defendant. *Ibid.*

And see ante, B. (a).

ESTOPPEL.

A. BY ACT OF PARTY.

B. BY MATTER OF RECORD.

A. BY ACT OF PARTY.

1. A., tenant for life, grants a void lease to B., who, on the death of A.,

pays rent to C., the remainder man, but afterwards assigns his lease to D., with notice of the payment of the rent to C. Upon an avowry for a distress by C., his title need not be proved. *Johnson* v. *Mason*, 1 Esp. 89, 91. Kenyon, C. J. 1794.

2. And semble, that in ejectment, D. would be equally precluded from denying C.'s title. *Ibid.*

3. A party who has given a draft for the amount of a tradesman's bill, cannot dispute the reasonableness of the charge. *Knox* v. *Whalley*, 1 Esp. 159. Kenyon, C. J. 1794.

4. In an action by the assignee of a lease, against the assignor, evidence of the execution of the assignment in which the original lease is adopted, renders any proof of the latter instrument unnecessary. *Nash* v. *Turner*, 1 Esp. 217. Kenyon, C. J. 1794.

And see PLEADING, H. (a).

5. A bankrupt who goes round to his creditors to solicit their votes in the choice of assignees, and acquiesces under the commission during three years, is estopped from bringing an action to try the validity of the bankruptcy. *Like* v. *Howe and Rogers*, 6 Esp. 20. Mansfield, C. J. 1806.

Acc. *Flower* v. *Heeber*, 2 Ves. 236.

6. A bailee cannot set up the title of a stranger against his bailor, *Anon.* cited, 3 Esp. 115. Gould, J. Maidstone.

Acc. Y. B. East. 7 H. 6, fo. 22, pl. 3.

7. But he may shew that the goods were sent to the plaintiff by a third person, to whom they belong. *Laclouch* v. *Towle*, 3 Esp. 114. Kenyon, C. J. 1800.

8. Warehouseman, at the request of vendor, acknowledges that he holds the goods at the disposal of the vendee; he cannot withhold them on the ground that the vendee became bankrupt before the property was completely vested in him. *Stonard* v. *Dunkin another*, 2 Campb. 344. Ellenborough, C. J. 1810.

9. A plaintiff is not estopped by a statement contained in an invoice of goods sold, respecting the period of credit, where such invoice is not delivered with the goods, or under a judge's order. *Bacon* v. *Chesney*, 1 Stark. 192. Ellenborough, C. J. 1816.

10. On the trial of an information for defrauding government by false musters, direct proof of the defendant's appointment need not be given, where he has described himself as major-commandant in his returns to the war office. *Rex* v. *Gardner*, 2 Campb. 513. Ellenborough, C. J. 1810.

11. A. mortgages to B., and afterwards sells to C., who also mortgages to D., reciting that B. had conveyed to him free of incumbrances. Without a strong case of fraud, this recital is conclusive evidence that the first mortgage was satisfied. *Jones, administrator of Pritchard*, v. *Williams*, 2 Stark. 52. Ellenborough, C. J. 1817.

B. BY MATTER OF RECORD.

12. The record of a judgment in an action by A. against B. and C., for obstructing a watercourse, is conclusive evidence of the rights of the parties, in another action by A. against B., *and other persons justifying under him*, for a similar obstruction. *Strutt* v. *Bovingdon and others*, 5 Esp. 58. Ellenborough, C. J. 1803.

Sed vide *Incledon* v. *Burges*, 1 Show. 47; *Outram* v. *Morewood*, 3 East, 346.

EVIDENCE.

A. RECORDS.

(a) *In what cases evidence.*

(b) *Where the only evidence.*

(c) *How proved.*

B. COURT ROLLS.

(a) *Where evidence.*

(b) *How proved.*

C. OTHER LEGAL PROCEEDINGS.

(a) *Where evidence.*

(b) *How proved.*

D. STATE PAPERS.

(a) *Where evidence.*

E. Other public instruments.

(a) *Where evidence.*

(b) *How proved.*

F. Private writings.

(a) *Where evidence.*

(b) *How proved.*

(c) *Hand-writing.*

G. Parol evidence.

(a) *To supply the place of written instruments.*

(b) *To explain them.*

(c) *Hearsay.*

H. Admissions.

(a) *By parties.*

(b) *By persons referred to by the parties.*

(c) *By privies.*

(d) *By co-trustee.*

(e) *By prior indorser.*

(f) *By wife.*

(g) *By partner.*

(h) *By agent.*

(i) *By stranger.*

I. Degree of evidence.

(a) *Best or secondary.*

(b) *Presumptive.*

(c) *Conclusive.*

K. Negative averments.

A. Records.

(a) *In what cases evidence.*

1. On an issue to try the right of electing churchwardens, the record of a trial in which the same title was directly in issue between other parties, claiming the same office in the same right, is evidence. *Berry and another* v. *Banner and another*, Peake, 156. Kenyon, C. J. 1792.

N. But not conclusive, *Reed* v. *Jackson*, 1 East, 355, 7; *Outram* v. *Morewood*, 3 East, 346, 366. And see Gilb. Ev. 31.

2. The record of a judgment for work and labour generally, cannot be applied to a particular transaction by parol evidence. *Sintzenick* v. *Lucas*, 1 Esp. 43. Kenyon, C. J. 1793.

Sed vide Action, A.

3. The registered memorial of a deed is not primary evidence. *Molton qui tam* v. *Harris*, 2 Esp. 549. Kenyon, C. J. 1797.

4. But the production of a deed with the memorial indorsed, is sufficient proof of the inrolment. *Compton* v. *Chandless, one, &c.* 4 Esp. 18. Kenyon, C. J. 1801.

S. P. Bull. N. P. 229.

5. To charge A. and B. as partners, the record of an issue out of the exchequer, directed to try the fact of the partnership in a suit between A. and B. is evidence. *Whately* v. *Manheim and Levy*, 2 Esp. 608. Kenyon, C. J. 1797.

6. A conviction is not evidence for the informer, though his name do not appear on the face of the proceedings. *Smith* v. *Rummens*, 1 Campb. 9. Ellenborough, C. J. 1807.

7. S. P. ruled in *Hathaway* v. *Barrow and others*, 1 Campb. 151. Mansfield, C. J. 1807.

Acc. *Burden* v. *Browning*, 1 Taunt. 520. And see *Richardson* v. *Williams*, 12 Mod. 319; *Rex* v. *Boston*, 4 East, 572. S. C. 1 Smith, 302; *Gibson* v. *M'Carty*, Cas. temp. Hardw. 311; *Hillyard* v. *Grantham*, 2 Vez. 246.

8. In an action by A. against B. for suing out an *alias fieri facias*, before the first writ was returned, under which the sheriff had seized goods sufficient to satisfy the execution, the plaintiff put in the writs. Held, that the defendant was entitled to have the returns read. *Gyfford* v. *Woodgate and another*, 2 Campb. 117. Ellenborough, C. J. 1808.

9. And it being stated in the return to the *first* writ, that an *alias* had already issued in pursuance of an agreement between the parties, it was held, that this was *primâ facie* evidence of a licence from the plaintiff, to proceed in this irregular manner. *Ibid.*

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 11 East, 297.

10. Upon an information for obstruct-

ing an officer, the prosecutor, in order to invalidate the testimony of a person who came to prove an alibi, produced a record of the conviction of the defendant before two magistrates for the same offence, which conviction purported to be grounded upon the depositions of the same witness. Ruled, that the record could only be read for the purpose of shewing that such a proceeding had taken place, and that it was not evidence to contradict the statement of the witness, whose testimony could be impuned only by calling persons who were present at the former examination, to prove on oath what there took place. *The King* v. *Howe*, 6 Esp. 124. Ellenborough, C. J. 1808.

11. Upon the trial of an ejectment respecting Black Acre, between A. and B., in which it was necessary for A. to prove that he was the legitimate son of J. S.; A., after proving by other evidence that J. S. was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in Chancery, instituted by A. against C. D. in order to perpetuate testimony to the alleged fact disputed by C. D., that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D. B., the defendant in the ejectment, did not claim Black Acre under either A. or C. D., the plaintiff and defendant in the Chancery suit. Held by the judges, (Graham, B. dissentient,) that the deposition could not be received upon the trial of such ejectment against B. as declaration of the alleged father, in matter pedigree. House of Lords,—Committee of Privileges on the petition of William Fitzharding Berkeley, claiming as of right to the Earl of Berkeley, Monday, May 13th, 1811. 4 Camp. 401.

12. Where one of two defendants in assumpsit pays the debt and costs after verdict to avoid execution, the parties in evidence to shew the amount of the debt in an action against the defendant for contribution. *Foster* v. *Compton*, 2 Stark. 364. Abbott, J. 1818.

A. (b) *Where the only evidence.*

12. Upon a justification as an officer under exchequer process, grounded upon an information filed against the plaintiff, the information must be produced. *O'Connor* v. *Charter*, 2 Esp. 641. Kenyon, C. J. 1798.

13. And the information must appear to be prior to the process. *Ibid.*

14. An averment that J. S. was arrested, "under a writ indorsed for bail, by virtue of an affidavit now of record," must be proved by the production of the affidavit. The production of the writ so indorsed, is not sufficient. *Webb* v. *Horne and Williams, Sheriff of Middlesex*, 2 Esp. 671. Eyre, C. J. 1798.

And the court of C. P. refused a rule to set aside nonsuit. *Ibid.* and 1 Bos. and Pul. 281.

15. To prove the issuing of a writ, an office copy should be produced, as it will be presumed to have been regularly returned. *Edmonstone* v. *Plaisted, gent. one, &c*, 4 Esp. 160. Ellenborough, C. J. 1803.

And see *Gyfford* v. *Woodgate*, ante, A. (a) 8.

16. To entitle a party to go into secondary evidence, it must be shewn, that search has been made in the treasury, and that subsequently to the return-day, the writ has been in possession of the opposite party. *Ibid.*

17. It is not sufficient to produce the præcipe in the filazer's book, and to prove a notice to produce the writ. *Ibid.*

18. The payment of money into court can be proved only by the rule. *Israel* v. *Benjamin*, 3 Campb. 40. Ellenborough, C. J. 1811.

19. To prove the day on which the court set for the trial of a cause at Nisi Prius, the record itself must be produced. *Thomas* v. *Ansley and Smith, sheriffs of London*, 6 Esp. 80. Ellenborough, C. J. 1806.

20. Where, however, there are proper materials, the postea may be indorsed in court. *Rex* v. *Hammond Page*, 2 Esp. 650, and 6 Esp. 83. Kenyon, C. J. 1788.

21. But where a juror has been withdrawn and the cause referred, *semble*, that such special circumstances will not be allowed to be indorsed in court at the second trial. *Ibid.*

22. Nor can the postea be read without a stamp. *Ibid.*

And see *Jones* v. *Randall*, Cowp. 17.

23. An averment, that a commission of bankrupt has been *duly* superseded, is not supported by the production of the chancellor's order for superseding the commission. *Poynton* v. *Forster and others*, 3 Campb. 60. Ellenborough, C. J. 1811.

A. (c) *How proved.*

24. A judge's order is sufficiently proved by the rule of court thereon. *Still and another* v. *Halford*, 4 Campb. 17. Ellenborough, C. J. 1814.

25. *Office* copies are not evidence in other courts, except where the officer has not performed his duty until he has delivered out a copy of the record. *Black* v. *Lord Braybroke*, 1 Stark. 13. K. B. H. T. 1817.

26. Therefore a copy of a colonial judgment under the hand of the chief clerk of the court, is not admissible here, although usually received in evidence there. *Ibid.* and *Appleton* v. *Lord Braybrooke*, 2 Stark. 6.

And the court of K. B. set aside a nominal verdict for the plaintiff. *Ibid.* K. B. H. T. 1817.

And see post, FOREIGN LAWS.

27 The correctness of the copy of a record is sufficiently proved by a witness who held the copy while some other person read over the original. *M'Neil* v. *Perchard et alt. sheriffs of London*, 1 Esp. 263. Kenyon, C. J. 1795.

28. S. P. ruled in *Reid* v. *Margison, esquire, late sheriff of Sussex*, 1 Campb. 469. Macdonald, C. B. Lewes, 1808, and Exch. M. 1808.

29. S. P. ruled in *Gyles and another, assignees of Smith*, v. *Hill and another*, 1 Campb. 471. Lawrence, J. 1809.

Dart v. *Rolf*, 2 Taunt. 52, S. P.

30. A fine may be proved either by an examined copy, or by the production of the chirograph or indentures. *Doe* d. *Lord Dormer* v. ..., Summer Assizes, 1816. Thomson, C. B. 1816.

31. Where an indictment sets out the title of an old statute, (5 Eliz. cap. 4.) agreeably to Ruffhead, which differs from a copy of the act lately printed by the king's printer, the court refused to direct a nonsuit without proof of an examination of the parliament roll. *Rex* v. *Barnitt*, 3 Campb. 344. Ellenborough, C. J. 1813.

B. COURT ROLLS.

B. (a) *Where evidence.*

32. Court rolls, containing licences to fish, granted in the 17th century at certain rents, are admissible to prove a prescriptive right to a several fishery, claimed as appurtenant to a manor, without shewing the actual payment of those rents, where it appears that during the last century, leases have been granted of the fishery, and that for the last 40 years the rents under the leases have been regularly paid, or that other acts of ownership have been acquiesced in. *Rogers and others* v. *Allen*, 1 Campb. 309. Heath, J. Chelmsford, 1808.

33. Ancient presentments are not evidence for the lord, unless signed by a party in privity of estate with the person against whom they are produced. *Benett* v. *Coster*. Burrough, J. Wilts Summer Assizes, 1817.

B. (b) *How proved.*

34. An examined copy of a particular entry in the court rolls of a manor, is evidence without producing the originals, even where it may be presumed that the books themselves contain other entries connected with the point in issue. *Doe* d. *Churchwardens of Croydon* v. *Cook*, 5 Esp. 221. Heath, J. Surry, 1805.

And see ·· Style, 450. *Rex* v. *Shelley*, 3 T. R. 141. *Rex* v. *Allgood*, 7 T. R. 746. *Rex* v. *Lucas*, 10 East. 235. *Bateman* v. *Phillips*, 4 Taunt. 162.

C. OTHER LEGAL PROCEEDINGS.

C. (a) *Where evidence.*

35. An examined copy of an affidavit made by a third person, filed at a judge's

chambers and used by the defendant on a motion to put off the trial is evidence against the defendant of a fact therein stated (that defendant was mortgagee in possession.) *Doe* d. *Hanley* v. *Wood.* Abbott, J. Cornwall Lent Assizes, 1818.

36. The deposition of a deceased examinant before commissioners of bankrupt is not evidence to prove the act of bankruptcy, unless it be enrolled. *Jellies, assignee,* v. *Mountford.* Abbott, J. Sittings after Trinity Term, 1818.

37. Letters of administration are not evidence of the death of a party. *Thompson* v. *Donaldson,* 3 Esp. 63. Kenyon, C. J. 1799.

38. Semble, that the sentence of the spiritual court is not sufficient evidence of a divorce, without producing the libel and proceedings. *Stedman* v. *Gooch,* 1 Esp. 4, 6. Kenyon, C. J. 1793.

Noell v. *Wells,* 1 Lev. 235; *Rex* v. *Vincent,* 1 Stra. 481; *Allen* v. *Dundas,* 3 T. R. 125; *De Metton* v. *De Mellon,* 12 East, 234. 1 Saund. 274, n. (3).

Peaslie's case, 1 Lev. 101. *Elden* v. *Keddell,* 8 East, 187; *Davis* v. *Williams,* 13 East, 232, Bull. N. P. 108, 246; *Tyssen* v. *Clarke,* 3 Wills. 551.

39. A divorce under the seal of a foreign court, is not evidence without calling persons to prove the laws of the country. *Ganer* v. *Lady Lanesborough,* Peake, 17. Kenyon, C. J. 1790.

Acc. *Fremoult* v. *Dedire,* 1 P. Wms. 431.

40. The production of the *postea* in a former cause between the same parties, will support a plea of set-off to the extent of the verdict. *Garland* v. *Scoones,* 2 Esp. 648. Kenyon, C. J. 1798.

S. P. contra, *Pitton* v. *Walter,* 1 Strange, 162.

41. The production of a bill of sale executed by the sheriff, reciting the issuing of the writ and the seizure under it, is sufficient evidence of the taking, without producing the writ or directly proving the seizure by the officer. *Woodward* v. *Larking,* 3 Esp. 286. Eldon, C. J. 1801.

42. In an action by original, the production of the declaration is not evidence of the commencement of the suit; but it is evidence that a suit was pending at the time of the delivery of such declaration. *Mathews* v. *Haigh,* 4 Esp. 100. Le Blanc, J. 1802.

And see ante ATTORNEY, A. 4. *Johnson* v. *Smith,* 2 Burr. 950.

43. Where a rule is made for examining a witness upon interrogatories, on the ground of his being about to leave the kingdom, his depositions may be read, if he has actually sailed on the voyage, though the vessel has been driven back into port by contrary winds. *Fonsick* v. *Agar and others,* 6 Esp. 92. Mansfield, C. J. 1806.

Acc. *Ward* v. *Wells,* 1 Taunt. 461.

44. As to the mode of examining upon interrogatories, see *Cazenove* v. *Vaughan,* 1 M. and S. 4. Gilb. Evid. 56, 7. Com. Dig. Evid. C. 4.

45. To prove the time of signing final judgment, the day-book at the judgment office, from which the judgments are entered into the docket-book, is not evidence. *Lee* v. *Meecock,* 5 Esp. 177. Lawrence, J. 1804.

46. In an action for goods sold, where the nisi prius record is entitled of Easter term, the declaration delivered by the plaintiff in Hilary term, is admissible to shew that the action was commenced before the expiration of the credit. *Harris* v. *Orme,* 2 Campb. 497. Ellenborough, C. J. 1809.

47. A bill in chancery is not evidence against the party, even of the facts on which he grounds his claim for relief. *Doe* d. *Bowerman* v. *Sybourn,* 2 Esp. 499. Kenyon, C. J. 1796.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 7 T. R. 12. S. P. by all the judges, Banbury peerage, Dom. Proc. 1809; Selw. 713. S. P. cont. Com. Dig. Evid. C. 2. And see *Owen* v. *Jones,* 2 Anst. 505.

48. Under a rule of the court to admit a notarial copy of the condemnation of a vessel in evidence, such copy only establishes the fact of the condemnation, and is not evidence of the particular defects upon which the condemnation purports to be grounded. *Wright* v. *Barnard,* 2 Esp. 700. Kenyon, C. J. 1798.

49. Where a defendant sets up his bankruptcy and certificate, and the plaintiff contends that the bankruptcy relied on is a second bankruptcy, under which the defendant has not paid 15*s.*

in the pound, the production of the proceedings under the former commission, wherein the surrender and last examination are stated, is sufficient evidence of such former commission. *Gregory* v. *Merton*, 3 Esp. 195. Kenyon, C. J. 1800.

Sed vide BANKRUPT, D. (b) 4, 5.

50. And it lies on the defendant to prove, that he has paid 15*s*. in the pound, under the second commission. *Ibid.*

51. Where the captain of an Indiaman has been examined upon interrogatories, under a rule of court, and has proceeded as far as Portsmouth on his outward bound voyage, his depositions may be read without its being distinctly proved, that he is out of the kingdom, and therefore incapable of being called. *Fonsick* v. *Agar and others*, 6 Esp. 92. Mansfield, C. J. 1807.

52. And semble, it is sufficient if the witness is on board the vessel and ready to sail. *Ibid.*

53. If the master of a private vessel, examined on interrogatories, refer to his log book, the entries referred to may be read as part of his deposition. *Falconer* v. *Hanson*, 1 Campb. 171. Ellenborough, C. J. 1808.

1 Anst. 201, 276, 2 Anst. 386, 3 Anst. 680, 923.

54. To entitle a party to read a deposition taken upon interrogatories, it is not sufficient to shew that the witness is a seafaring man, and that he lately belonged to a vessel in the Thames, without proving for what post the vessel was bound, or that any inquiry had been made for the witness. *Ibid.*

And see Quinct. lib. 5, cap. 7.

55. The examination of a party charged with a felony before a magistrate cannot be taken on oath. *R.* v. *Smith and another*, 1 Stark. 242. Le Blanc, J. York, 1816.

56. And if it purport to be so taken, evidence to prove that no oath was taken is inadmissible. *Ibid.*

C. (b) *How proved.*

57. In an action for maliciously holding to bail, the bare production of the writ by a person who received it in a letter, will not entitle the plaintiff to have it read. *Jackson* v. *Burleigh*, 3 Esp. 34. Kenyon, C. J. 1799.

58. Secus, after proof of the affidavit to hold to bail, and of the warrant founded upon the writ. *Ibid.*

59. The copy of an Irish judgment is not proved by shewing that it was compared with a parchment roll, produced to the witness in the Four Courts, Dublin. *Adamthwaite* v. *Synge*, 4 Campb. 372. 1 Stark. 183. Ellenborough, C. J. 1816.

60. It must be shewn that the record was seen in the hands of the proper officer, or in the proper place for the custody of such records. *Ibid.*

61. The copy of the deposition of a person examined upon interrogatories at the chief justice's chambers, signed by the chief justice, and received from his clerk, must be taken *primâ facie* to be a correct copy of what has been sworn by such witness; nor need the original examination be produced until some suspicion of forgery is thrown upon the signature of the deponent. *Duncan* v. *Scott*, 1 Campb. 100. Ellenborough, C. J. 1811.

62. So the office copy of a *rule*, when received in the usual course of office, does not require to be proved to be an examined copy. *Ibid.*

S. P. *Selby* v. *Hawes*, Lord Raym. 745. And see Peake's Evidence, 33.

63. Depositions taken under a commission issuing out of the Exchequer, cannot be read without producing the commission, unless they are of so long standing as to afford a presumption that the commission is lost. *Bayley et alt.* v. *Wylie*, 6 Esp. 85. Ellenborough, C. J. 1807.

64. But in no case is it necessary to produce the *bill* and *answer*, upon which the commission was granted. *Ibid.*

65. An examined copy of an answer in chancery may be read without producing the original. *Hodgkinson* v. *Willis*, 3 Campb. 401. Ellenborough, C. J. 1813.

66. But the identity of the parties must be shewn. *Ibid.*

67. The practice of the ecclesiastical courts is a matter of fact to be proved by witnesses. *Beaurain, gent.* v. *Sir W. Scott*, 3 Campb. 388. Ellenborough, C. J. 1813.

68. To prove the appointment of an umpire, it is not sufficient to produce the joint award of the arbitrators and umpire in which the appointment is recited. *Still and another* v. *Halford*, 4 Campb. 17. Ellenborough, C. J. 1814.

And see *Maule* v. *Stawell*, 15 East, 99.

D. State papers.

D. (a) *Where evidence.*

69. A paper from the secretary of state's office, transmitted by the British ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another foreign state, is admissible for the purpose of shewing the precise period of the commencement of the war. *Thelluson* v. *Cosling*, 4 Esp. 266. Ellenborough, C. J. 1803.

And see Co. Litt. 249, b.

70. To prove the appointment of an officer to a commission in the army, the gazette is not evidence, unless the opposite party refuse to produce the commission upon notice. *Kirwan* v. *Cockburn*, 5 Esp. 233. Ellenborough, C. J. 1805.

71. S. P. *Rex* v. *Gardner*, 2 Campb. 513. Ellenborough, C. J. 1810.

72. A book published by authority in a foreign country, as a regular copy of treaties concluded by the state, is not evidence without proving it to have been compared with the original archives. *Richardson* v. *Anderson*, 1 Campb. 65. Ellenborough, C. J. 1805.

73. Documents transmitted by British consuls, stating the arrival of vessels at particular ports, are not evidence. *Roberts, et alt.* v. *Eddington*, 4 Esp. 88. Kenyon, C. J. 1801.

And see *Waldron* v. *Coombe*, 3 Taunt. 162.

74. The king's proclamations must be proved by the production of the gazette, and will not be judicially noticed by the court. *Van Omeron* v. *Dowick and others, et al.* 2 Campb. 44. Ellenborough, C. J. 1809.

Acc. Anon. per King, C. 12 Vin. Abr. Evidence, 129. And see *Rex* v. *Holt*, 5 T. R. 436, 43; *Dupays* v. *Shepherd*, 12 Mod. 216.

E. Other public instruments.

E. (a) *Where evidence.*

75. Semble, that the fleet books are not evidence of a marriage celebrated even before the marriage act. *Doe* d. *Orrell* v. *Madox*, 1 Esp. 197. Kenyon, C. J. Maidstone, 1794.

76. S. P. ruled in *Read* v. *Passer*, 1 Esp. 213, and Peake, 231. Kenyon, C. J. 1794.

77. S. P. ruled in *Haywood* v. *Firmin*, Peake, 233, n. Pratt, C. J, 1766.

78. S. P. ruled in *Howard* v. *Burtonwood*, Peake, 233, n. De Grey, C. J. 1766.

79. S. P. ruled in *Cooke* v. *Lloyd*, Peake, 233, n. Le Blanc, J. Shrewsbury, 1803.

80. S. P. ruled contra, in *Doe* d. *Passingham* v. *Lloyd*, Peake, 231, and 1 Esp. 215. Heath, J. Shrewsbury, 1794.

81. But semble, that on a question of *pedigree*, the books of the fleet are evidence to shew the name by which a woman passed when she was married there. *Lawrence and others* v. *Dixon*, Peake, 136. Kenyon, C. J. 1792.

82. An examined copy of the register of a marriage in the Swedish ambassador's chapel at Paris, is not evidence. *Leader* v. *Barry*, 1 Esp. 353. Kenyon, C. J. 1795.

83. To prove the time of the sailing of a convoy, the log-book of the ship of war, under whose protection the convoy is admitted to have sailed, is evidence. *D'Israeli* v. *Jowett*, 1 Esp. 427. Eyre, C. J. 1795.

And see Peake's Evid. 79.

84. Such log book and the official letter of the commander to the Admiralty were read without objection, as proof that the fleet encountered a storm, and that a particular vessel parted company. *Watson and another, administrators of Maxwell*, v. *King*, 4 Campb. 272. Ellenborough, C. J. 1815.

S. C. not S. P. 1 Stark. 121.

85. And the log-book of a merchantman may be used by a witness to refresh his memory, with respect to a fact which he remembers to have seen there at a time when he had a clear recollection of the circumstance. *Burrough* v.

Martin, 2 Campb. 112. Ellenborough, C. J. 1809.

Acc. *Jacob* v. *Lindsay*, 1 East, 460.

86. To charge two persons as joint vendees of a cart, the entry of such cart in the books of the tax-gatherer *as the property of both*, is not evidence, without shewing that the parties authorized the entry. *Weaver* v. *Prentice and Pratt*, 1 Esp. 369. Kenyon, C. J. 1795.

87. The book kept by the master of the king's bench, into which are copied the names of the attorneys from the original roll, is good evidence to prove a party an attorney. *Rex* v. *Crosley, gent.* 2 Esp. 526. Kenyon, C. J. 1797.

88. The unsigned entry in the office for licensing stage coaches, is not evidence that the persons named in the licence are the owners. *Strother* v. *Willan and others*, 4 Campb. 24. Gibbs, C. J. 1814.

89. Where the wife of A. B. obtains goods after stating that her husband is dead, it is not a sufficient answer to an action for the amount, to shew by the muster of a ship from the admiralty, that a person of the name of A. B. was living at the time. *Barber* v. *Holmes*, 3 Esp. 190. Kenyon, C. J. 1800.

90. The book kept at the Sick and Hurt Office, in which are copied the different returns, made by officers of the navy, of persons dying on board, is evidence to shew the time of a seaman's death. *Wallace, administrator*, v. *Cook*, 5 Esp. 117. Ellenborough, C. J. 1804.

91. The custom-house copy of the searcher's report, produced by the officer, in whose custody it is lodged, is evidence of the actual shipment of the goods therein specified. *Johnson* v. *Ward*, 6 Esp. 47, 8. Chambre, J. 1806.

92. An unsigned map, or terrier, is not evidence. *Earl, clerk*, v. *Lewis*, 4 Esp. 1. Heath, J. Chelmsford, 1801.

93. Though it purport to have been taken by competent authority, and have been generally received as authentic. *Pollard* v. *Scott*, Peake, 18. Kenyon, C. J. 1790.

And see *Atkins* v. *Watson*, 2 Anst. 386; *Lygon* v. *Strutt, ibid.* 601.

94. An advertisement in a daily newspaper, is not notice to a person who is not proved to be in the habit of reading such paper. *Boydell* v. *Drummond*, 2 Campb. 157. Ellenborough, C. J. 1808.

95. A statute requires that notice shall be given previously to the election of a parish officer. An averment that I. S. was *duly* appointed, is proved by an entry in the vestry-book, stating that he was appointed at a vestry, *duly held in pursuance of notice*. *Rex* v. *Martin*, 2 Campb. 100. Macdonald, C. B. Maidstone, 1809.

And see *Cox* v. *Copping*, 5 Mod. 395, 6; *Rex* v. *Mothersall*, 1 Strange, 93. *Rex* v. *Hostmen of Newcastle*, 2 Strange, 1222. *Ibid.* 1223, n. *Rex* v. *Mayor, &c. of Liverpool*, 4 Burr. 2244.

96. Though a *copy* of a contract with the land-tax commissioners is made evidence by 42 Geo. 3. cap. 116. s. 165. the original contract is not evidence by implication. *Burdon* v. *Rickets*, 2 Campb. 121. Ellenborough, C. J. 1809.

And see Sav. 46. pl. 98. post, PENAL ACTION, B. (x).

97. In an action for stores furnished for a ship by the captain's order, the register purporting to have been obtained by all the defendants, on the oath of one of them, was held to be *primâ facie* evidence to charge them as owners. *Stokes* v. *Carne and others*, 2 Campb. 339. Ellenborough, C. J. 1809.

98. But semble, that the defendants might have held the plaintiff to stricter proof of their ownership, by giving him notice that they meant to deny it. *Ibid.*

And see *Paterson* v. *Hardacre*, 4 Taunt. 115, 7. ante, E. (a) 86, 88. BILLS AND NOTES. I, (c) 329, 330, 331, 2. post, SHIP, A.

99. To prove a vessel British-built, the register is not evidence, without shewing that the parties there described as owners were privy to the register and proving, through some other medium, that he was the owner. *Reusse* v. *Meyers*, 3 Campb. 475. Ellenborough, C. J. 1813.

100. A notarial protest is not evidence that a foreign bill has been presented for payment in England. *Chesmer* v. *Noyes*, 4 Campb. 129. Ellenborough, C. J. 1815.

And see Manning's Ex. Practice, 503.

101. The captain's protest is not evi-

dence in chief, and cannot be read to falsify a condemnation; it is admissible only for the purpose of contradicting the captain's testimony. *Christian* v. *Coombe*, 2 Esp. 489. Kenyon, C. J. 1796.

And see post, F. (a) 2.

102. The books at Lloyd's are evidence of a capture. *Abel* v. *Potts*, 3 Esp. 242. Le Blanc, J. 1800.

103. But they are not evidence of notice, unless coupled with particular circumstances. *Ibid.*

104. An old entry in a vestry-book, signed by the churchwardens, stating, that a pew had been repaired by A. *in consideration of his using it*, is evidence for a person claiming the pew under A. *Price* v. *Littlewood*, 3 Campb. 288. Ellenborough, C. J. 1812.

And as to title to pews, see *Cowen's* case, 12 Co. 104, 5. *Bunton* v. *Bateman*, 1 Lev. 71. S. C. 1 Sid. 201, 3. *Ashly* v. *Freckleton*, 3 Lev. 73; *Stocks* v. *Booth*, 1 T. R. 428; *Rogers* v. *Brooks*, *ibid.* 431; *Cross* v. *Salter*, 3 T. R. 639; *Griffiths* v. *Matthews*, 5 T. R. 296.

E. (b) *How proved.*

105. An entry made by a deceased overseer in the parish books, whereby he takes credit for several disbursements, and charges himself with rates received, cannot be read for the purpose of shewing that a particular disbursement was made on account of the parish, although by such entries the overseer has admitted a balance due from himself and the account has been allowed by the magistrates. *Doe* d. *Foot and others* v. *Barter and another.* Holroyd, J. Dorchester Spring Assizes, 1819.

But *Buller* v. *Mitchell* in the Exchequer, where the contrary was ruled, though the point is not noticed in Mr. Price's Report, was not cited.

106. To prove a transfer of stock, a copy from the bank books must be produced; the testimony of the broker who effected the transfer, is insufficient. *Breton* v. *Cope*, *executor*, Peake, 30. Kenyon, C. J. 1791.

And see Douglas, 572, [illegible]3. 593, n. *Man* v. *Carey*, 3 Salk. 155.

107. But such copies are direct evidence; and the court, for the sake of example, would not allow the books themselves to be read. *Marsh* v. *Collnett*, 2 Esp. 665. Kenyon, C. J. 1797.

108. In trover for a ship, if the plaintiff produce the original register, and attempt, unsuccessfully, to deduce a title under it, he cannot afterwards rely upon his possession. *Sherriff* v. *Cadell*, 2 Esp. 617. Kenyon, C. J. 1798.

109. The common seal of the city of London, proves itself. *Doe* d. *Woodmas* v. *Mason*, 1 Esp. 53. Kenyon, C. J. 1793.

Acc. *Olive* v. *Guin*, 2 Siderf. 145. S. C. Hardres, 118. Anon. 9 Mod. 66. Sed vide *Moises* v. *Thornton*, 8 T. R. 303.

110. To support an allegation, that "the plaintiff has duly taken the degree of doctor of physic," it is not sufficient to produce a diploma under the university seal, and to prove the hand-writing of the subscribing officers. *Moises* v. *Thornton, M. D.* 3 Esp. 4. Kenyon, C. J. 1799.

And the court of K. B. discharged a rule for setting aside nonsuit. *Ibid.* and 8 T. R. 303. And see *Smith* v. *Taylor*, 1 N. R. 196.

111. Papers delivered by the son of a deceased rector to the successor's attorney, as old parish documents, are sufficiently identified by the attorney without calling the son. *Earl, clerk*, v. *Lewis*, 4 Esp. 1. Heath, J. Chelmsford, 1801.

F. Private writings.

F. (a) *Where evidence.*

112. In assumpsit for 2-5ths. of a loss recovered by defendants as agents for S. an invoice sent by S. to defendants to enable them to recover from the underwriters, is evidence of plaintiffs' interest. *Mendham and another* v. *Thompson and another*, 1 Stark. 316. Ellenborough, C. J. 1816.

113. But an invoice made out by S. and not shewn to have been so sent, was rejected as merely S.'s declaration. *Ibid.*

And see post, 132, Insurance, P. (a.)

114. The offer of a theatrical engagement contained in a letter, directed to

"A. B. *primo buffo*, Amsterdam," cannot, by reason of this direction, be construed into an agreement to employ in that capacity. *Chiodi* v. *Waters*, 1 Stark. 335. Ellenborough, C. J. 1816.

115. Defendant calling for the plaintiff's books, but not using them, does not make them evidence for the plaintiff. *Sayer* v. *Kitchen*, 1 Esp. 209, 10. Kenyon, C. J. 1794.

116. A letter written by a witness falsifying his present testimony, may be read for the purpose of impeaching his credit. *De Sailly* v. *Morgan*, 2 Esp. 691. Kenyon, C. J. 1798.

And see ante E. (a) 101.

117. Entries made in a banker's books of payments made by him, are not evidence after a year, though the entering clerk be dead, and his hand-writing proved. *Sikes and others* v. *Marshal*, 2 Esp. 705. Kenyon, C. J. 1798.

And see 7 Jac. 1. cap. 12. *Lord Torrington's* case, 1 Salk. 285; *Pitman* v. *Maddox*, 2 Salk. 690; *Clerk* v. *Bedford*, Bull. N. P. 282, post, F. (b) 1, 2, 3, 4, 5.

118. The dangerous illness of a witness is not sufficient to make entries by him evidence. *Harrison* v. *Blades*, 3 Campb. 457. Ellenborough, C. J. 1813.

119. An entry in a tradesman's book, made by a servant since dead, is not evidence against a customer, unless the effect of such entry be to charge the servant. *Calvert* v. *Archbishop of Canterbury*, 2 Esp. 646. Kenyon, C. J. 1798.

And see *Roe* v. *Rawlings*, 7 East, 279. S. C. 3 Smith, 259. *Higham* v. *Ridgway*, 10 East, 109; *Doe* v. *Robson*, 15 East, 32. Bunb. 142. pl. 220.

120. To prove delivery of an attorney's bill, an indorsement by a deceased clerk, "March 4th, 1815, delivered a copy to A.B.," is not sufficient, unless shewn to be contemporaneous. *Champneys* v. *Peck*, 1 Stark. 404. Ellenborough, C. J. 1816.

121. In an action for the price of cloth, a written order by plaintiff to deliver back the cloth to bearer, being in defendant's possession, is presumptive proof of the re-delivery. *Shepherd* v. *Currie*, 1 Stark. 454. Ellenborough, C. J. 1816.

122. A notice to produce a letter, which letter expresses that it covers several papers, without particularly referring to them, does not entitle the party to have the enclosures read. *Johnson* v. *Gilson*, 4 Esp. 21. Kenyon, C. J. 1801.

123. The production of a cheque drawn by the debtor on his banker, in favour of the creditor, *and indorsed by the creditor or his agent, is primâ facie* evidence of payment. *Egg* v. *Barnett*, *gent.* 3 Esp. 196. Kenyon, C. J. 1800.

But it is not evidence to *create* a debt. *Aubert* v. *Walsh*, 4 Taunt. 293.

124. A bill for business done in a particular court, is not sufficient to prove that the party is an attorney *of that court*. *Green* v. *Jackson*, Peake, 236. Kenyon, C. J. 1794.

And see *Berryman* v. *Wise*, 4 T. R. 366; *Cross* v. *Kaye*, 6 T. R. 664.

125. In *assumpsit* for goods sold, where the defendant gives in evidence an account, stated between himself and the plaintiff on the record, and a receipt by the latter for the balance, in full satisfaction of all demands, it is no answer to this defence at nisi prius, that before the date of the receipt the plaintiff assigned his effects for the benefit of creditors, that the defendant had notice of this assignment, that no money passed upon the giving of the receipt, that the whole was a collusion to cheat the creditors, on whose behalf the action is brought; the receipt being a legal bar to the action, unless it can be shewn that the nominal plaintiff was himself imposed upon. *Alner* v. *George*, 1 Campb. 392. Ellenborough, C. J. 1808.

And see *Bauerman* v. *Radenius*, 7 T. R. 663. post, H. (a) 8; *Rowntree* v. *Jacob*, 2 Taunt. 141; *Filmer* v. *Gott*, 7 Bro. C. P. 70: *Porter* v. *Phillips*, Palm. 218; *Walker* v. *Consett*, Forrest, 157; *Veale* v. *Warner*, 1 Saund. 325, n. 4; *Pistor* v. *Dunbar*, 1 Anst. 186.

126. But semble, that the court will interfere on motion, to prevent the defendant from availing himself of such a defence. *Alner* v. *George*, *ubi supra*.

Acc. *Legh* v. *Legh*, 1 Bos. and Pull. 447. S. P. *[illegible]n* v. *Williams and others, executors, &c.* [illegible]. B. H. T. 1813. M.S.

127. If the plaintiff's witness refer to a book, and the defendant require it to

be produced, he makes the whole evidence against him. *Wharam* v. *Routledge*, 5 Esp. 235. Ellenborough, C. J. 1805.

128. And he cannot be allowed to see the book before he determines whether he will have it read or not. *Ibid.*

129. Where the master of a merchantman, examined on interrogatories, refers to his log-book, the entries referred to form part of his deposition. *Falconer* v. *Hanson*, 1 Campb. 177. Ellenborough, C. J. 1808.

130. And where one of the questions refers to a letter, the letter must be produced, or the whole examination will be rejected; the party cannot abandon the particular question only. *Wheeler, assignee of Bryan*, v. *Atkins*, 5 Esp. 246. Ellenborough, C. J. 1805.

131. To establish the insanity of a prisoner, papers found at his lodgings, and proved to have been written by him before the commission of the offence, were offered to be read, but were rejected, on the ground, that what a party has written, may be evidence against him, but not for him. *Rex* v. *Casaux*. Garrow, B. Old Bailey, May, 1818.

132. In an action against underwriters, the bill of lading, signed by the captain, is not evidence of the shipment of the goods. *Dickson* v. *Lodge*, 1 Stark. 226. Ellenborough, C. J. 1816.

And see post, INSURANCE, P. (a).

133. Where a party is charged with the repair of a road, ratione tenuræ, an award made upon the submission of a former tenant, for years, cannot, as against the landlord, or a succeeding tenant, be received as evidence of an adjudication. *Rex* v. *Cotton*, 3 Campb. 444. Ellenborough, C. J. 1813.

134. A letter inclosing a promissory note, may be read as evidence, by the writer, to shew the purpose for which the note was sent. *Bruce and others*, v. *Hurley*, 1 Stark. 23. Ellenborough, C. J. 1815.

135. Upon the trial of an ejectment, respecting Long Acre, between E. and F., in which it was necessary for E. to prove that he was the legitimate son of W., the said W. being at that time dead. E., after proving by other evidence that W. was his reputed father, offered to give in evidence, an entry in a bible, in which bible, W. had made such entry in his own hand-writing, that E. was his eldest son, born in lawful wedlock, from G. the wife of W., on the 1st day of May, 1778, and signed by W. himself. Held by the Judges, unanimously, that such entry in such bible, or in any other book, or on any other piece of paper, could be received to prove that E. is the legitimate son of W., a declaration of W. in matter of pedigree. *Ibid.*

House of Lords Committee of Privileges, on the petition of William Fitzharding Berkeley, claiming, as of right, to the Earl of Berkeley, Monday, May 13th, 1811. 4 Camph. 401.

136. Upon the trial of an ejectment, respecting Little Acre, between N. and P., in which it was necessary for N. to prove that he was the legitimate son of T., the said T. being at that time dead. N., after proving by other evidence that T. was his reputed father, offered to give in evidence an entry in a bible, in which bible T. had made such entry in his own hand-writing, that N. was his eldest son, born in lawful wedlock, from J. the wife of T., on the 1st day of May, 1778, and signed by T. himself; and it was proved in evidence on the said trial, that the said T. had declared "that he, T., "had made such entry for the express "purpose of establishing the legitimacy, "and the time of the birth, of his "eldest son N., in case the same should "be called in question, in any case or "in any cause whatsoever, by any per-"son, after the death of him the said "T." Held by the Judges, unanimously, that such entry in such bible, or in any other book, or in any other piece of paper, could be received to prove that N. is the legitimate son of T., as a declaration of T., in matter of pedigree, but with strong circumstances of suspicion, on account of its particularity. *Ibid.*

And see ante, A. (a) 11.

137. A letter stated in plaintiff's opening, as part of defendant's case, for the purpose of introducing evidence in answer, is not admitted by such statement, but must be proved by defendant before he can use it. *Willis* v. *Dyson*, 1 Stark. 166. Ellenborough, C. J. 1816.

138. A shipping entry at the Custom-house, made from a shipping note de-

livered by plaintiff, is not evidence to fix him with a fraud, though the note is proved to have been destroyed. *Hughes* v. *Wilson*, 1 Stark. 179. Ellenborough, C. J. 1816.

134. But it would be evidence of the time of sailing. *Ibid.*

135. Notice of dissolution, signed by a partner, is evidence against him, of legal dissolution, though partnership be created by deed. *Doe, d. Waithman*, v. *Miles*, 1 Stark. 181. Ellenborough, C. J. 1816.

F. (b) *How proved.*

(And see Stamps, D. 9, 10, 11, 3 Anst. 789.)

136. An entry made by a clerk in a trader's book, can only be proved by the clerk himself. *Cooper* v. *Marsden*, 1 Esp. 1. Kenyon, C. J. 1793.

137. Such an entry is not made evidence by proving the hand-writing of the clerk, and that he is abroad. *Ibid.*

138. But semble, that a person who saw the entry soon after it was made, may prove that fact in corroboration of more direct evidence. *Digby* v. *Stedman et alt.* 1 Esp. 328. Kenyon, C. J. 1795.

139. After notice to produce a letter, the correctness of a copy may be proved by any person who has read the original, as well as by the clerk who wrote it. *Liebman and others* v. *Pooley and others*, 1 Stark. 167. Ellenborough, C. J. 1816.

140. But where plaintiff had given notice to defendants to produce a letter, and proved an acknowledgment of their having received a copy of such letter, in the plaintiff's book, made by a deceased, whose entries had frequently been examined, and found correct, was allowed to be read. *Pritt and others* v. *Fairclough and others*, 3 Campb. 305. Ellenborough, C. J. 1812.

141. So the copy of a letter, accompanied with a memorandum, in the hand-writing of a deceased clerk, purporting that the original had been forwarded by him, was admitted as evidence, upon proof that this was his usual mode of transacting business. *Hagedorn* v. *Reid*, 3 Campb. 377, 9. Ellenborough, C. J. 1812.

And see ante, F. (a) 117, 119.

142. A bond 30 years old, found amongst the papers of a corporation, who were the obligees, is admissible without proof of the hand-writing of the obligor or attesting witness. *The Governor and Company of the Chelsea Water-works* v. *Cowper*, 1 Esp. 275. Kenyon, C. J. 1795.

Acc. Bull. N. P. 255; *Fry* v. *Wood*, Selw. 517, (n) 8; *Rees* v. *Mansell, ibid.* (n) 9.

143. If accompanied with possession or something equivalent. *Forbes, administrator of Henchett* v. *Wall*, 1 Esp. 278. Lord Mansfield, C. J. 1764.

S. C. 1 Bla. 532. And see Co. Litt. b. b. *Doe* v. *Earl of Pembroke*, 11 East, 504.

Sed vide *Benson* v. *Olive*, Bunb. 284, 5.

144. Copy of a letter taken by a copying machine, is not evidence without notice to produce the original. *Nodin* v. *Murray*, 3 Campb. 228. Ellenborough, C. J. 1812.

145. Held, that where the copy of a deed is given in evidence after notice to the opposite party to produce the original, the execution need not be proved. *Doxon* v. *Haigh et alt.* 1 Esp. 409. Kenyon, C. J. 1795.

Sed vide *post*, pl. 149, 150; *Gordon* v. *Secretan*, 8 East, 548; *Pearce* v. *Hooper*, 3 Taunt. 60.

146. The copy of a notice is in itself an original, and may be given in evidence without notice to produce the counterpart delivered. *Gotlieb* v. *Danvers*, 2 Esp. 455. Eyre, C. J. 1796.

147. An instrument produced by the adverse party, under a notice, cannot be given in evidence as an agreement between such party and a stranger, unless it be stamped. *Doe d. St. John* v. *Hore*, 2 Esp. 724. Kenyon, C. J. 1799.

148. Semble, that a notice to produce a notice calling for the production of papers, is unnecessary, and that an examined copy of the notice served is sufficient. *Surtees et alt.* v. *Hubbard*, 4 Esp. 203. Ellenborough, C. J. 1802.

Acc. *Jory* v. *Orchard*, 2 Bos. and Pul. 39.

149. When ship's articles come out of the hands of the adverse party upon notice, the subscribing witness must be called, except in the single case of an

action by a seaman for wages, for which occasion the articles are made evidence of themselves, by 2 Geo. II. cap. 26. 2 Geo. II. cap. 36. sect. 2. and 8. *Johnson* v. *Lewellin*, 6 Esp. 101. Ellenborough, C. J. 1807.

150. And the rule extends to agreements *not under seal*. *Wetherston* v. *Edgington*, 2 Campb. 95. Heath, J. Kingston, 1809.

S. P. as to deeds, *Gordon* v. *Secretan*, 8 East, 548, 9. Sed vide *Pearce* v. *Hooper*, 3 Taunt. 60, where this rule is narrowed. And see *Cooke* v. *Stocks*, Tidd, 505, 6; *Bateman* v. *Philips*, *ibid.* 505, 620, and 4 Taunt. 157; *Taylor* v. *Osborne*, cited, 4 Taunt. 159, 161, 162.

151. An indorsement on a bond in the hand-writing of the obligee, dated in 1795, acknowledging the receipt of interest and part of principal, cannot be produced to meet evidence of payment in 1794, without proving that it was on the bond recently after the day on which it bears date, and at a time when such indorsement directly militated against the writer's interest. *Rose, administrator, &c.* v. *Bryant*, 2 Campb. 321. Ellenborough, C. J. 1809.

And see *Searle* v. *Lord Barrington*, 2 Stra. 826, *and cases there cited.*

N. But such proof seems to have been impossible under the circumstances of the case, since immediately upon the settlement in 1794, it became the interest of the obligee to manufacture evidence from which it might be inferred that something remained due.

152. The copy of a bill delivered by an attorney to his client, is evidence, without notice to produce the original. *Anderson, administrator*, v. *May*, 3 Esp. 167. Eldon, C. J. 1800.

And the court of C. P. refused a rule for a new trial; 2 Bos. and Pul. 237.

153. But where no such counterpart has been kept, and no notice has been given, the plaintiff cannot state the items of the bill from his books. *Philipson* v. *Chase*, 2 Campb. 110. Ellenborough, C. J. 1809.

Acc. *Anderson* v. *May*, 2 Bos. and Pul. 237.

154. Where written notice of the dishonour of a bill has been left at the defendant's house, secondary evidence may be given of the contents of such notice, without a notice to produce it. *Ackland* v. *Pearce*, 2 Campb. 599. Le Blanc, J. 1811.

155. Where the terms of a licence require that the time of sailing should be indorsed thereon, and the licence was burnt at the Custom-house, a proper indorsement was presumed. *Butler* v. *Allnutt*, 1 Stark. 222. Ellenborough, C. J. 1816.

F. (c) *Hand-writing.*

156. To prove an instrument to be in the hand-writing of a deceased rector, it is not sufficient to compare it with official returns made in the time of such rector, and signed with his name. *Brookbard* v. *Woodley*, Peake, 20, n. Yates, J. Worcester, 1770.

157. To make signatures to ancient documents available for this purpose, a witness must be produced, who will swear that by examining several such signatures, he has acquired a sufficient knowledge of the hand-writing, to be enabled, without a contemporaneous comparison, to state his belief as to the instrument attempted to be proved. *Sparrow, clerk*, v. *Farrant.* Holroyd, J. Devon Spring Assizes, 1819.

But see Bull, N. P. 236.

158. After it has been sworn that an acceptance is in the hand-writing of the defendant, the latter cannot produce another paper confessedly written by him, and call a clerk from the post-office to state, that from inspecting the two instruments, he is of opinion that the acceptance is an imitation. *Stranger* v. *Searle*, 1 Esp. 14. Kenyon, C. J. 1793.

But similar evidence was admitted in *Goodtitle* v. *Braham*, 4 T. R. 497, 8.

159. Hand-writing cannot be disproved by a person who has merely seen the party write since the commencement of the action, for the purpose of making him a witness. *Ibid.*

160. The full signature of an acceptor is not sufficiently proved by a witness who has seen the party sign his name but once before, when he used only the initial of his Christian name. *Powell* v. *Ford*, 2 Stark. 164. Ellenborough, C. J. 1817.

161. A clerk from the post-office may be asked whether, from the bare inspection of the signature, he can pronounce it to be a forgery. *Ibid.*

S. P. *Goodtitle* v. *Braham*, 4 T. R. 497, 8.

162. An acknowledgment by a party of his hand-writing, though made pending a treaty for a compromise, is evidence against him. *Waldridge* v. *Kennison et alt.* 1 Esp. 143. Kenyon, C. J. 1794.

163. In a case where there was contradictory evidence respecting the defendant's hand-writing, the jury were allowed to compare letters, admitted to have been written by him with the disputed signature. *Allesbrook* v. *Roach*, 1 Esp. 351. Kenyon C. J. 1795.

S. C. Peake's Evid. 104, 7. Chitty on Bills, 496. Acc. *Goodtitle* v. *Braham*, 4 T. R. 497. And see Co. Litt. 6, b. Sed vide *Dacosta* v. *Pym*, Peake's Evid. App. lxxxv.

164. To prove the hand-writing of a member of parliament, the opinion of a clerk employed to inspect franks, who has never had occasion to apply to the member to verify his hand-writing, is insufficient. *Batchelor* v. *Sir John Honeywood*, 2 Esp. 714. Kenyon, C. J. 1799.

165. If a witness, who has seen the drawee write only once, *thinks* that the acceptance is in his hand-writing, it is evidence to go to a jury, though he state that he can form no *belief* on the subject. *Garrells* v. *Alexander*, 4 Esp. 37. Ellenborough, C. J. 1801.

166. If, however, his opinion rests upon a comparison of hands, it is inadmissible. *Ibid.*

167. As where he has merely seen the party subscribe his name to another instrument, to which he is the attesting witness, and is unable to form an opinion respecting the hand-writing of the party, without examining such other instrument. *Filliter and others, assignees of Blisset*, v. *Minchin and Carter*. Holroyd, J. Winchester Spring Assizes, 1819.

168. Hand-writing is well proved by a witness who has received letters from the party, in answer to letters written to him by the witness, although the witness has never done any act in consequence of the receipt of such letters. *Doe d. Turner* v. *Wallinger*. Holroyd, J. Dorchester Spring Assizes, 1819.

169. But a person skilled in the detection of forgeries, may prove that a particular libel is written in a feigned hand, though he never saw the defendant write. *The King, on the prosecution of Jackson*, v. *Cator*, 4 Esp. 117. Hotham, B. Maidstone, 1802.

S. P. *Goodtitle d. Revett*, v. *Braham*, 4 T. R. 497.

170. But his opinion, that the particular libel is in the defendant's hand-writing, which he forms from comparing it with letters, which are proved to have been written by the defendant, is inadmissible. *Ibid.*

Acc. *Cary* v. *Pitt*, Peake's Evid. App. lxxxiv.

Sed vide *Goodtitle d. Revett*, 4 T. R. 497.

171. And the same rule is observed in civil cases. *Macferson* v. *Thoytes*, Peake, 20. Kenyon, C. J. 1790.

172. S. P. *Stranger* v. *Searle*, 1 Esp. 14. Kenyon, C. J. 1793.

173. A witness who has seen a party write, but has forgotten the character of the hand-writing, may refresh his memory by referring to the instrument which he saw the party write. *Burr* v. *Harper*, Holt, 420. Dallas, J. 1816.

174. To prove an acceptance to have been forged by J. S. the drawee cannot give evidence of similar forgeries committed by J. S. *Balcetti* v. *Serani and another*, Peake, 142. Kenyon, C. J. 1792.

175. S. P. ruled in *Viney* v. *Barss*, 1 Esp. 293. Kenyon, C. J. 1795.

S. P. ruled by Lord Mansfield, in *Graft* v. *Bertie*, Peake's Evid. 103. Chitty on Bills, 494.

G. Parol Evidence.

G. (a) *To supply the place of written instruments.*

176. Where, on principles of public policy, a document cannot be read in evidence, the effect will be the same as if it was not in existence. *Cooke* v. *Maxwell*, 2 Stark. 183. Bayley, J. 1817.

K 2

177. Therefore where such a document contains an order from a public officer, no evidence can be given of its contents, but it may be shewn that was done, was done by the order of such officer. *Ibid.*

178. Oaths taken by a preacher under the toleration act, are matter of record, and cannot be proved by parol evidence. *Rex* v. *Hube and others*, Peake, 131. Kenyon, C. J. 1792.

179. Held, that in trover for a bill of exchange, parol description of the instrument cannot be given, unless the defendant has had notice to produce the bill. *Cowan* v. *Abrahams and another*, 1 Esp. 50. Kenyon, C. J. 1793, and K. B. 1794.

180. But it has since been held, that in assumpsit against a carrier for the non-delivery of promissory notes, the instruments may be described by parol, without notice to produce the originals. *Jolley* v. *Taylor*, 1 Campb. 143. Mansfield, C. J. 1807.

Acc. *How* v. *Hall*, 14 East, 274. And see *Bucher* v. *Jarratt*, 3 Bos. and Pull. 143; *Rex* v. *Aikle*, Leach, C. C. 330.

181. Where usury is stated to have been committed in discounting the bill, upon which the action is brought, and another bill, in one undivided transaction, no parol evidence is admissible as to the contents of the latter, unless notice has been given to produce it. *Hattam* v. *Withers*, 1 Esp. 259. Kenyon, C. J. 1795.

182. Semble, that evidence of usage, is inadmissible to support a claim to a *private right. Withnell, clerk*, v. *Gartham, clerk*, 1 Esp. 322, 4. Kenyon, C. J. 1795.

S. P. arg. in S. C. 6 T. R. 338.

183. To prove that A. was chosen constable, the wardmote book containing an account of the election, should be produced; a list from the town clerk's office of the persons sworn in to serve the office, in which the name of B. appears as having been sworn as substitute for A. is not the best evidence. *Underhill* v. *Witts*, 3 Esp. 56. Kenyon, C. J. 1799.

184. A. gives a warrant of attorney to secure a joint debt to B. and C. B. receives the whole. In an action by C. to recover his moiety, A. may be called to prove the payment without the production of the warrant of attorney. *Bayne* v. *Stone, executor of Stone*, 4 Esp. 13. Kenyon, C. J. 1801.

185. A witness cannot give evidence of the particular contents of accounts which are not produced. *Roberts and another, assignees, &c.* v. *Doxon*, Peake, 83. Kenyon, C. J. 1791.

186. But he may be examined as to the general state of accounts. *Ibid.*

187. So he may prove that a party has accepted bills in a particular form *according to one invariable course of dealing. W. Spencer* v. *Billing*, 3 Campb. 310. Ellenborough, C. J. 1812.

188. But if the mode of dealing varies, the bills must be produced. *Ibid.*

189. In an action for not delivering goods, manufactured by the defendant in pursuance of an order signed by the plaintiff only, the precise terms of the contract, and the defendant's accession to it, may be proved by parol. *Ingram* v. *Lea*, 2 Campb. 521. Ellenborough, C. J. 1810.

190. Although a receipt have been given, the fact of payment may be proved by a person present. *Rambert* v. *Cohen*, 4 Esp. 213, 4. Ellenborough, C. J. 1802.

191. In an action against overseers, acts done by them in that capacity, are evidence of their being overseers. *Merrill's lessee*, v. *Whitechurch and others*. Burrough, J. Salisbury, 1817.

192. But they are not concluded by the acts of former overseers, without regular proof of their appointment. *Ibid.*

193. Or by the act of a co-defendant previous to the commencement of his overseership; comme semble. *Ibid.*

194. To prove rent to be payable quarterly, evidence that the landlord's other tenants, under similar circumstances, pay quarterly, is not admissible. *Carter* v. *Pryke*, Peake, 95. Kenyon, C. J. 1791.

195. Upon an indictment for sacrilege, laying the property in the custody of A. and B. churchwardens, it is sufficient to shew that A. and B. have acted in that capacity. *Rex* v. *Mitchell*. Abbott, J. Salisbury Spring Assizes, 1818.

Q. (b) *Parol evidence to explain written instruments.*

(And see INSURANCE, Q. (b).)

196. Witnesses may be called to shew that a particular expression in a commercial contract, is understood in the mercantile world, in a different sense from its ordinary import. *Chaurand and another* v. *Angerstein*, Peake, 43. Kenyon, C. J. 1791.

197. Or that a particular meaning was affixed to the word of indeterminate signification, (privilege) in a previous conversation between the parties. *Birch and another* v. *Depeyster*, 4 Campb. 385, 1 Stark. 210. Gibbs, C. J. 1816.

And see *Iggulden* v. *May*, 7 East, 237; 3 Smith, 269; 9 Ves. 325; 2 N. R. 449, S. C.

198. It is no answer to an express warranty, that there is a custom in the trade to reject the article within a limited time. *Ycats and another* v. *Pim and another*, Holt, 95. Heath, J. 1815.

And see *Anderson* v. *Pitcher*, 2 Bos. and Pull. 168.

199. In an action on a promissory note, the defendant cannot set up a verbal agreement entered into at the time of the making of the note, whereby the plaintiff engaged to take a renewal of the note, instead of payment at maturity. *Hoare and others* v. *Graham and another*, 3 Campb. 57. Ellenborough, C. J. 1811.

200. Where in a written agreement for a purchase, an appraisement on 13th August was a condition precedent, verbal evidence of the enlargement of the time for the appraisement by consent, is admissible. *Thresh* v. *Rake*, 1 Esp. 53. Kenyon, C. J. 1793.

Acc. *Cuff* v. *Penn*, 1 M. and S. 21. Cont. *Snowball* v. *Vicaris*, Bunb. 175.

201. Where an old deed vests a power *in the vicar and churchwardens* of presenting to an endowed school, evidence of usage is admissible to shew, that the right of nomination may be exercised by a majority. *Withnell, clerk*, v. *Gartham, clerk*, 1 Esp. 322. Kenyon, C. J. 1795.

And the court of K. B. discharged a rule for a new trial. 6 T. R. 338.

Acc. *Att. Gen.* v. *Parker*, 3 Atk. 576, 7. S. C. 1 Vez. 43; *Rex* v. *Varlo*, Cowp. 248.

202. If a bill of lading contain a memorandum, "to be discharged in 14 days," or pay five guineas a-day demurrage, evidence of usage may be adduced to shew, that *working* days and not *running* days, are meant. *Cochran* v. *Retberg et alt.* 3 Esp. 121. Eldon, C. J. 1800.

And see Abb. 222.

203. Where a party proves a custom with respect to way-going crops, and a written agreement is shewn to have existed, such party is not bound to produce it, although he has averred in his declaration, that the defendant was not exempted from the operation of the custom by any special agreement. *Senior* v. *Armytage, bart.* Holt, 197. Thomson, C. B. York, 1816.

204. A person to whom *all matters in dispute between the parties* have been referred, may be called to prove that a particular claim was made, though the award is general, and contains no reference to such claim. *Martin* v. *Thornton*, 4 Esp. 180. Alvanley, C. J. 1802.

205. Parol evidence is not admissible to vary the terms of a written declaration; but it may be shewn that the party signed the instrument by mistake. *Holsten* v. *Jumpson*, 4 Esp. 189. Ellenborough, C. J. 1802.

And see dictum per Willes, J. in *Macbeath* v. *Haldimand*, 1 T. R. 181; *Peirson* v. *Pounteys*, Yelv. 135; *Parkinson* v. *Collier*, Park, 416; *Cutter* v. *Powell*, 6 T. R. 320; *Robertson* v. *French*, 4 East, 135.

206. Nor can the plaintiff rely upon such an agreement as excusing him from the obligation to give notice of dishonor. *Free and others* v. *Hawkins*, Holt, 551. Gibbs, C. J. 1817.

207. The words of an ancient grant from the crown, may be extended beyond their literal import, by evidence of contemporaneous exposition and constant usage. *Mayor of London* v. *Long*, 1 Campb. 22, 180, b. Ellenborough, C. J. 1807.

Acc. Vaughan. 169; *Sheppard* v. *Gosnold.*

208. A collateral stipulation may be engrafted by parol on a written contract;

as that the hirer of a horse shall be liable for all accidents. *Jeffery* v. *Walton*, 1 Stark. 267. Ellenborough, C. J. 1816.

209. Where a note purports to be payable on demand, no parol evidence can be admitted to shew that it was to be payable on a contingency. *Rawson* v. *Walker*, 1 Stark. 361. Ellenborough, C. J. 1816.

G. (c) *Hearsay.*

210. A ship-builder may state his opinion as to the sea-worthiness of a vessel, upon facts found at a survey at which he was not present. *Thornton* v. *Royal Exchange Assurance Company*, Peake, 25. Kenyon, C. J. 1790.

211. A clergyman after celebrating a marriage, stated to the witness that the friends of the wife forbade the banns. This is not evidence of that fact; but is an admission by the clergyman, of his having married the parties without banns. *Standen* v. *Standen and others*, Peake, 30. Kenyon, C. J. 1791.

212. Witnesses may be called to prove what a deceased witness swore at a former trial between the same parties. *Strutt* v. *Bovingdon and others*, 5 Esp. 56. Ellenborough, C. J. 1803.

213. Where, in an action for breach of promise of marriage, the defendant relies upon the general bad character of the plaintiff, a witness may be examined as to representations made to him by third persons. *Foulkes* v. *Sellway*, 3 Esp. 236. Kenyon, C. J. 1800.

214. The declaration of a person in possession, may be received as *primâ facie* evidence of a breach of covenant by underletting. *Doe* d. *Hindly* v. *Rickarby*, 5 Esp. 4. Alvanley, C. J. 1803.

And see *Ivat* v. *Finch*, 1 Taunt. 141; *Peaceable* v. *Watson*, 4 Taunt. 16.

H. Admissions.

H. (a) *By parties.*

(And see Insolvents, A. (b). Limitation of actions, A. (c) Baron and Feme, A. (a) 3.)

215. An acknowledgment by the defendant, that his trade was a nuisance, is admissible, though not conclusive, evidence against him, upon an indictment for carrying on the same trade in another place. *Rex* v. *Bartholomew Neville*, Peake, 91. Kenyon, C. J. 1791.

216. A warrant directed to A. and B., is returned indorsed by A., but the arrest is proved to have been made by a person calling himself B.; this is evidence to charge B. with the arrest. *Slack* v. *Brander and Tebbs, sheriffs of London and Coulson*, 1 Esp. 42. Kenyon, C. J. 1793.

217. An answer to a bill in chancery, filed against the defendant by a stranger, may be read to shew the admission of a particular fact, though it is not evidence of a judicial proceeding. *Grant* v. *Jackson, bart. and others*, Peake, 203. Kenyon, C. J. 1793.

218. Giving credit *in a particular*, for a demand of the opposite party, is not an admission of the debt. *Miller* v. *Johnson*, 2 Esp. 602. Eyre, C. J. 1797.

219. Concessions made for the purpose of settling matters in dispute, are not evidence. *Gregory* v. *Howard*, 3 Esp. 113. Kenyon, C. J. 1800.

S. P. *Turton* v. *Benson*, 1 P. Wms. 496, 7; *Harman* v. *Vanhatton*, 2 Vern. 717.

220. But admissions before arbitrators are evidence. *Ibid.*

S. P. *Westlake* v. *Collard*, Bull. N. P. 236.

221. And any admissions which the party would be obliged to make in an answer to a bill in equity. *Slack* v. *Buchannan*, Peake, 5. Kenyon, C. J. 1790.

222. A receipt in full, given with a knowledge of all the circumstances attending the demand, is a complete bar to an action. *Bristow et alt. assignees of Clark and Gilson*, v. *Eastman*, 1 Esp. 172. Kenyon, C. J. 1794.

Ante, F. (a) 120, 121. post, H. (a) 238. *Walker* v. *Consett*, Forrest, 157.

223. An acknowledgment of a party's hand-writing, though made pending a treaty of compromise, is evidence against him. *Waldridge* v. *Kennison, et alt.* 1 Esp. 143. Kenyon, C. J. 1794.

224. An admission by an indorser of his liability made without notice of the laches of the indorsee, or of the legal consequences of such laches, was

held not to be binding. *Rouse, executor,* v. *Redwood,* 1 Esp. 155. Kenyon, C. J. 1794.

Sed vide *Stevens* v. *Lynch,* 12 East, 38, cont. as to the latter point.

225. Upon a building lease of 59 feet, *more or less,* the lessee takes 62 feet, but the ground taken agrees with the abuttals in the lease, and the lessor sees the process of the building without objecting. This is evidence of an acquiescence to go to the jury. *Neale* d. *Leroux* v. *Parkin and Lambert,* 1 Esp. 229. Kenyon, C. J. 1794.

And see *Attorney General* v. *Baliol College, Oxford,* 9 Mod. 411; *East India Company* v. *Vincent,* 2 Atk. 83.

226. Inventory exhibited by administrator in the spiritual court, is evidence of assets to the amount stated. *Hickey* v. *Hayter, administratrix,* 1 Esp. 313. Kenyon, C. J. 1795.

227. An auctioneer who advertises for sale "*the property of J. S. a bankrupt,*" is precluded from disputing the bankruptcy of J. S. in an action by the assignees for the proceeds. *Maltby, assignee of Durouveray,* v. *Christie,* 1 Esp. 340. Kenyon, C. J. 1795.

228. Letters written by a party are evidence against him, without producing the answers to such letters. *Lord Barrymore, administrator,* v. *Taylor,* 1 Esp. 326. Kenyon, C. J. 1795.

And see *Smith* v. *Young,* 1 Campb. 439; *Randle* v. *Blackburn,* 5 Taunt. 245.

229. If A. having title to premises in the possession of B., suffer B. to make alterations inconsistent with such title, it is evidence to go to a jury of recognition of A. of the right of B. *Doe* d. *Winckley* v. *Pye, esq. Principal of Barnard's Inn,* 1 Esp. 364. Kenyon, C. J. 1795.

And see *Doe* v. *Allen,* 3 Taunt. 78.

230. Admissions by the plaintiff on the record, are evidence for the defendant, though such plaintiff be merely an agent for a third person. *Bouerman* v. *Radenius,* 2 Esp. 653. Kenyon, C. J. 1798.

And the court of K. B. discharged a rule for setting aside nonsuit. *Ibid.* and 7 T. R. 663.

And see *Lane* v. *Chandler,* (in Scacc.) 3 Smith, 77, 81.

231. The examination of a party before commissioners of bankrupt, is evidence against him, although part only of his deposition was noted down, if he signed such partial minutes after they had been read over to him. *Milward, assignee of Gates,* v. *Forbes,* 4 Esp. 172. Ellenborough, C. J. 1802.

232. Testimony given in court, admitting a particular fact, may be used in an action against the witness; though at the former trial he was prevented entering into an explanation of the circumstances under which the fact took place, such explanation being then irrelevant. *Collett* v. *Lord Keith,* 4 Esp. 212. Le Blanc, J. 1802.

233. Where the drawer of a dishonoured bill objects to pay the amount, on the ground of his having received no consideration, but says nothing concerning the indorsement, his silence in this respect is not an admission of the handwriting of the first indorser. *Duncan* v. *Scott,* 1 Campb. 100. Ellenborough, C. J. 1807.

234. An answer in chancery, stating that the defendant "believes that H. M. was *possessed* of the *leasehold* premises, mentioned in the bill," is evidence against him in an action of ejectment, brought by the executor of H. M. to shew that the testator had a chattel interest in the property. *Doe* d. *Digby* v. *Steel,* 3 Campb. 115. Ellenborough, C. J. 1811.

235. Upon an information for a libel against the proprietor of a newspaper, the defendant is not concluded under 38 Geo. III. cap. 78. sect. 9. by the production of a certified copy of his affidavit, unless it be stated in the *jurat,* that the party before whom the affidavit was made, had authority from the commissioners to take it. *Rex* v. *White,* 3 Campb. 99. Ellenborough, C. J. 1811.

236. But in such case the counsel for the crown may produce the original affidavit, and shew by extrinsic evidence, that it was made before a person of competent authority; *after which they may proceed to give the general evidence,* admitted by 38 Geo. III. cap. 78. sect. 11. *Ibid.*

237. A bill for business done in a particular court, is not sufficient to prove

that the party is an attorney of that court. *Green* v. *Jackson*, Peake, 236. Kenyon, C. J. 1794.

And see *Berryman* v. *Wise*, 4 T. R. 366; *Cross* v. *Kaye*, 6 T. R. 663.

238. In an action against a ship-owner for a mariner's share of the proceeds of a prize, the defendant produces a receipt in full of all demands, which is shewn by the plaintiff to have been given by him in consequence of a misrepresentation by the defendant of the amount of the proceeds, such receipt is not binding. *Benson* v. *Bennett*, 1 Campb. 394. n. Mansfield, C. J. 1808.

And see ante, F. (a) 120, 121. H. (a) 222.

239. The holder of .. bill overdue, gives in a blank schedule, under an insolvent act. This is not such an acknowledgment, that the bill has been satisfied, as will discharge the defendant, the acceptor. *Hart* v. *Newman*, 3 Campb. 13. Ellenborough, C. J. 1811.

And see *Rex* v. *Feversham*, 8 T. R. 352.

240. A letter by a party, in which he speaks of a ship, as his own ship, does not conclude him from shewing that he used these expressions as agent to a third person. *Tulloch* v. *Boyd*, Holt. 487. Gibbs, C. J. 1816.

H. (b) *By persons referred by the parties.*

241. An award made upon a parol submission, may be given in evidence under a count upon the original demand. *Kingston* v. *Phelps*, Peake, 227. Kenyon, C. J. 1794.

242. A person agrees to admit a claim, provided J. S. will make an affidavit in support of it. The affidavit is conclusive. *Lloyd* v. *Willan*, 1 Esp. 178. Kenyon, C. J. 1794.

S. P. post, H. (i) 2.

243. The vendee of goods denies having received them, but adds, "If the carrier's servant says he delivered the goods, I will pay you." The answer of the servant when applied to on the subject, may be given in evidence after his death. *Daniel* v. *Pitt*, 1 Campb. 366, n. S. C. 6 Esp. 74. Ellenborough, C. J. 1807.

244. A. takes a forged note from B.; on its being returned, B. says, he received the note from C. to whom he refers A. for information. C.'s statement is evidence against B. *Brock* v. *Kent*, *widow*, 1 Campb. 366, n. Ellenborough, C. J. 1806.

245. Where an executor refers a creditor of the testator to A. for information respecting the state of the assets, an admission by A. is evidence; and A. need not be called. *Williams*, *spinster*, v. *Innes and others*, *executors*, 1 Campb. 364. Ellenborough, C. J. 1808.

H. (c) *By privies.*

246. In an action against trustees for creditors, a declaration of the debtor is evidence of plaintiff's debt. *Robson* v. *Andrade*, 1 Stark. 372. Ellenborough, C. J. 1816.

N. The declaration seems to have been made at the time the trust was created.

247. Semble, that in an action for a false return for a *fi. fa.* an admission of the debt by the original defendant is evidence against the sheriff, even where it is contended that the execution was sued out fraudulently, for the purpose of covering the goods. *Kempland* v. *Macauley and another*, Peake, 65. Kenyon, C. J. 1791.

Acc *Dyke* v. *Aldridge*, 7 T. R. 665. S. C. 11 East, 584, n. S. C. not S. P. 4 T. R. 436. Post, WITNESS, A. (c).

248. An admission by a former occupier of a tenement, in respect of which common is claimed, is evidence to negative the existence of the right, though such tenant be alive. *Walker* v. *Broadstock*, 1 Esp. 458. Thomson, B. Worcester, 1795.

And see post, § 12.

249. In an action by the trustees of an insolvent estate, subsequent declarations of the insolvent are not evidence for the defendant. *Smith et alt.* v. *Simmes*, 1 Esp. 330. Kenyon, C. J. 1795.

250. To prove a bill of sale fraudulent, declarations made by the vendor *at the time of executing it*, are evidence. *Phillips* v. *Eamer et alt. sheriff of Middlesex*, 1 Esp. 357. Kenyon, C. J. 1795.

251. Secus, of declarations made at any other time. *Ibid.*

252. An admission by the principal,

is evidence against the surety; and the principal need not be called. *Perchard and Hamerton, sheriffs of London*, v. *Tindall*, 1 Esp. 394. Kenyon, C. J. 1795.

And see *Dyke* v. *Aldridge*, 7 T. R. 665, and 11 East, 584, n.

253. But on the execution of an inquiry under 8 and 9 W. III. cap. 2. on an indemnity bond, an admission by the principal of the amount of the damnification was considered inadmissible, and the amount was proved aliunde. *Cutler* v. *Newlin*. Holroyd, J. Winchester Spring Assizes, 1819.

254. So where goods are sold to A. on the guarantee of B., A.'s *subsequent* declaration respecting the terms of the sale, are not evidence against B. *Bacon* v. *Chesney*, 1 Stark. 192. Ellenborough, C. J. 1816.

255. If A. guarantee the payment of such goods as B. shall deliver to C., the declarations of C. respecting the delivery of goods are not evidence against A.; C. should himself be called. *Evans et alt.* v. *Beattie, executor of Beattie*, 5 Esp. 26. Ellenborough, C. J. 1803.

256. On an indictment against A. and B. for conspiring with others to do an illegal act, the declarations of any persons who are proved to have been parties to the conspiracy, are evidence against A. and B. *Rex* v. *Salter and others*, 5 Esp. 125. Hotham, B. Kingston, 1804.

257. Where in an action for a false return, an execution against B. at the suit of A. is impeached for fraud, on the ground that B. had, four months before, sued A. for a debt, and had given him time for the payment of this debt, the affidavit of B., upon which the process in such prior suit issued, is evidence against A. *Penn* v. *Scholey and Domville, sheriffs of London*, 5 Esp. 243. Ellenborough, C. J. 1805.

261. In an action for taking insufficient pledges in replevin, the circumstance of one of the pledges having repeatedly promised payment to his creditors, and of his having broken such promises, is evidence against the sheriff. *Gwyllim* v. *Scholey, et alt.* 6 Esp. 100. Ellenborough, C. J. 1807.

262. In an action by a corporation, the *declaration* of an individual freeman is not evidence for the defendant. *Mayor of London* v. *Cole*, 1 Campb. 22. Ellenborough, C. J. 1807.

And see *Mayor, &c. of London* v. *Gold*, 2 Keble, 295; *Lord Dorset* v. *Carter*, 3 Keble, 300; *Rex* v. *City of London*, 1 Vent. 351. S. C. 2 Lev. 231. 1 Vern. 254. 2 Vern. 351. *Rex* v. *Inhab. of Woburn*, 10 East, 395. *Rex* v. *Inhab. of Hardwicke*, 11 East, 378.

263. In an action against the sheriff for a false return of *nulla bona*, where the defence relied upon is an act of bankruptcy overreaching the levy, the plaintiff may give in evidence an admission made by one of the petitioning creditors, as to any fact respecting his debt. *Young and Barley* v. *Smith and Phillips, sheriffs of London*, 6 Esp. 121. Mansfield, C. J. 1808.

Post, WITNESS, A. (c).

264. A paper signed by the deceased owner of a copyhold, stating that an adjoining garden was not copyhold, but held by him at an annual rent, is evidence to prove that the garden was not part of the copyhold estate. *Doe* d. *Baggalley* v. *Jones*, 1 Campb. 367. Ellenborough, C. J. 1808.

Acc. *Ivatt* v. *Finch*, 1 Taunt. 141. *Peaceable* v. *Watson*, 4 Taunt. 16.

And see *Doe* d. *Johnson* v. *Earl of Pembroke*, 11 East, 504.

265. The party under whom defendant in replevin makes cognizance, may be examined at the trial; and consequently his declarations are not evidence for the plaintiff. *Hart* v. *Horn*, 2 Campb. 92. Heath, J. Kingston, 1809.

266. But in an action for freight by the master, the declarations of the owner were admitted as evidence for the defendant. *Smith* v. *Lyon*, 3 Campb. 465. Ellenborough, C. J. 1813.

And see *Dyke* v. *Aldridge*, 7 T. R. 665. 11 East, 584. *Rex* v. *Woburn*, 10 East, 395. and observations of Le Blanc, J. *ibid.* 402. *Rex* v. *Hardwick*, 11 East, 578.

267. To prove a forfeiture by underletting, the declarations of a person found in possession, are evidence against the lessee. *Doe* d. *Hindley* v. *Rickarby*, 5 Esp. 4. Alvanley, C. J. 1803.

Sed vide WITNESS, post, C. (i) where in *covenant* against the original lessee the sub-lessee was himself called.

269. One of two lessors in ejectment

by several demises, cannot be required to impeach the title of the other lessors, though it appear by the evidence, that he has no interest in the premises. *Fenn* d. *Pewtriss and another* v. *Granger*, 3 Campb. 177. Ellenborough, C. J. 1812.

270. But the objection may be waved. *Ibid.*

Rex v. *Woburn*, 10 East, 403.

Acc. *Norden* v. *Williamson*, 1 Taunt. 378. And if he refuses to answer, his declarations are evidence. *Rex* v. *Hardwick*, 11 East, 579; *Rex* v. *Whitley*, 1 M. and S. 636.

272. In an action for usury, an admission by the borrower is not evidence for the lender. *Maugham, qui tam,* v. *Walker*, Peake, 163. Kenyon, C. J. 1792.

273. But where the testimony of the borrower is material, and cannot be obtained by reason of his being out of the country, the court will grant a new trial. *Ibid.*

S. C. upon a motion for leave to compound; 5 T. R. 98.

275. In an action for a false return of *nulla bona*, where the instructions for the defence came from the assignees, an admission by the petitioning creditor, one of the assignees, affecting the validity of the debt, may be given in evidence. *Dowden* v. *Fowle, esq.* 4 Campb. 38. Dampier, J. 1814. Ante 247, 263.

H. (d) *Joint trespasser.*

276. In trespass against a constable for an entry under a pretence of a warrant to search, evidence may be given of what was said by a joint trespasser to induce defendant to join in the trespass; this being a motive of action. *Goding* v. *Gill.* Ellenborough, C. J. Sittings after M. Term, 1817.

H. (e) *Co-trustee.*

277. An admission of assets by one trustee does not affect his co-trustees. *Davies* v. *Ridge and others*, 3 Esp. 101. Kenyon, C. J. 1800.

H. (f) *By prior indorser.*

278. Letters of indorser cannot be read to impeach the title of the indorsee, even where a note is indorsed when over-due. *Clipsam* v. *O'Brien*, 1 Esp. 10. Kenyon, C. J. 1793.

279. Semble, that in an action by the indorsee of a promissory note against the maker, an admission by the payee of his indorsement, is evidence. *Maddocks* v. *Hankey*, 2 Esp. 647. Kenyon, C. J. 1798.

280. Where the defence to an action against an acceptor is, that after the bill was due the amount was settled in account between himself and the then holder, under whose indorsement the plaintiff claims, the declarations of such holder are not evidence, as he might be called and examined. *Duckham* v. *Wallis*, 5 Esp. 251. Ellenborough, C. J. 1805.

281. So where A. indorsed to B. as a security for a running account, and B. after the bill became due, indorsed to C. an entry or declaration by B. respecting the state of his account with A. are not evidence for the latter, unless made contemporaneously with the first indorsement. *Collenridge* v. *Farquharson*, 1 Stark. 259. Ellenborough, C. J. 1816.

H. (g) *By wife.*

282. Admission by wife of a debt arising out of a transaction conducted by her as agent to her husband, is evidence against him. *Emerson* v. *Blonden*, 1 Esp. 142. Kenyon, C. J. 1794.

283. S. P. ruled in *Palethorp* v. *Furnish*, 2 Esp. 511, n. Buller, J. 1783; and in *Anderson* v. *Sanderson*, 2 Stark. 204, Holt, 591. Richards, C. B. York, 1817.

284. In an action to recover money taken from plaintiff's wife, on the ground that it was the produce of goods she had been concerned in stealing, what she afterwards said when examined on the charge of being concerned in the robbery, respecting the money which never appeared to have been in the husband's possession, is evidence for the defendant. *Carey* v. *Adkins*, 4 Campb. 92. Ellenborough, C. J. 1814.

285. In such an action if facts be proved to raise a suspicion that the money taken from the wife was the pro-

duce of stolen property, plaintiff must shew whence the money was derived, and that the wife was *bonâ fide* in possession of it for him. *Ibid.*

H. (h) *By partner.*

286. Semble, that defendant is concluded by the admission of a debt by a partner who is not joined. *Thwaites* v. *Richardson*, Peake, 16. Kenyon, C. J. 1790.

S. P. *Whitcomb* v. *Whiting*, Doug. 629, 652.

287. After *primâ facie* evidence of partnership, the declaration of one copartner is evidence against both. *Nicholls* v. *Dowding and Kemp*, 1 Stark. 81. Ellenborough, C. J. 1815.

288. A *nolle prosequi* being entered as to one defendant, who pleads bankruptcy, an admission by him before he obtained his certificate, is evidence against the other defendants, after proof of a partnership between them. *Grant* v. *Jackson, bart. and others*, Peake, 203. Kenyon, C. J. 1793.

289. An admission by a partner as to a subject not of co-partnership but of co-part-ownership in a vessel, is not binding on his co-partner. *Jaggers* v. *Binnings and another*, 1 Stark. 64. Ellenborough, C. J. 1815.

H. (i) *Guardian.*

290. The declarations of the guardian on record, are not evidence against the infant. *Cowling* v. *Ely*, 2 Stark. 366. Abbott, J. 1818.

H. (k) *By agent.*

291. Where the defendant's attorney, without his privity, consents to settle the action, provided J. S. will make an affidavit of the facts, the defendant is concluded by such affidavit. *Lloyd* v. *Willan*, 1 Esp. 178. Kenyon, C. J. 1794.

And see H. 21 H. 6. fo. 31. pl. 17. Godbolt, 291. Manning's Exch. Pra. 365, 604.

292. A representation made by an agent *at the time*, respecting a verbal contract entered into with him, is evidence to effect his employer. *Peto* v. *Hague*, 5 Esp. 134. Ellenborough, C. J. 1804.

293. Where a party being applied to for payment, says "A. will pay you," an admission made by A. is sufficient to bind the principal; and A. need not be called. *Burt, administrator*, v. *Palmer*, 5 Esp. 145. Ellenborough, C. J. 1804.

294. An affidavit in which a person describes himself agent in a particular transaction, is not evidence of his possessing such authority; he ought himself to be called. *Johnson* v. *Ward*, 6 Esp. 47. Chambre, J. 1806.

295. But where the principal moves to put off a trial upon such affidavit, he admits the truth of the allegations which it contains. *Ibid.*

S. P. ante pl. 36. And see Gilb. Evid. 30.

296. The circumstance of a party's taking his seat in parliament, is evidence to go to a jury of his having acceded to the character of a candidate, and adopted the acts of his committee. *Morris, esq.* v. *Burdett, bart.* 1 Campb. 218. Ellenborough, C. J. and K. B. 1808.

H. (l) *By attorney.*

297. Admissions made by the attorney on the record, for the sake of obviating the necessity of proving particular facts, are conclusive on the client. *Young and another* v. *Wright*, 1 Campb. 140. Ellenborough, C. J. 1807.

298. But statements made by such attorney in the course of conversation, are not evidence. *Ibid.*

Acc. *Wilson* v. *Turner*, 1 Taunt. 398.

299. Declarations made by an attorney in conversation, are not evidence against his client. *Parkins* v. *Hawkshaw*, 2 Stark. 239. Holroyd, J. 1817.

N. Qu. whether if the attorney refused to be examined as to such statements, on the ground of his having derived his information from his client, the declarations of the attorney might not be considered as the declarations of the principal?

300. A letter from the vendor's broker to the purchaser, explaining the terms of a contract, is not evidence against the

principal. The broker should be called. *Maesters* v. *Abraham*, 1 Esp. 375. Kenyon, C. J. 1795.

N. Sed quære, unless the letter referred to a contract *already made*. *Fairlie* v. *Hastings*, 10 Ves. 123. Ante, pl. 247.

301. In an action against the sheriff for a false return of *non est inventus*, a declaration made *at the time* by the bailiff to the plaintiff's attorney *as to the cause of his not executing the writ*, is evidence, and may be adduced in contradiction of his testimony at the trial. *North* v. *Miles, knight, and another, late sheriff of Middlesex*, 1 Campb. 389. Ellenborough, C. J. 1808.

302. So in an action for an escape, declarations made by the bailiff, *whilst he had the party in custody*, are admissible. *Bowsher* v. *Calley, esq. sheriff of Wilts*, 1 Campb. 391, n. Ellenborough, C. J. 1808.

303. In an action against A. and B. owners of a ship, it is *primâ facie* evidence of ownership, to put in an undertaking to appear for them, given before the commencement of the action by the person who subsequently acted as their attorney in defending it, in which he describes them as owners. *Marshall and another* v. *Cliff and another*, 4 Campb. 133. Ellenborough, C. J. 1815.

304. An enemy domiciled in a neutral state, ships a cargo for his own country, under the name of a neutral. The vessel is captured by a British cruizer, and the cargo is, with the privity of the enemy, claimed by the neutral and restored to him. The enemy cannot sue the neutral for the proceeds, though it do not appear to be certain, that a full knowledge of the facts would have altered the decision of the court of admiralty. *De Metton and another* v. *De Mellon*, 2 Campb. 420. Ellenborough, C. J. 1810.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 12 East, 234.

305. An admission signed by the obligor's attorney, acknowledging the *signature* of his client and of the *attesting witness*, is presumptive evidence of the *delivery* of the deed. *Milward* v. *Temple*, 1 Campb. 375. Ellenborough, C. J. 1808.

H. (m) *By stranger.*

306. In an action for firing at the natives on a foreign coast, and thereby preventing them from trading with the plaintiff, the declarations of the natives are not evidence. *Tarleton and others* v. *M'Gauley*, Peake, 205. Kenyon, C. J. 1793.

307. The holder of a bill agrees not to sue the drawee, provided the latter will make an affidavit that the acceptance is a forgery. If the affidavit be made, though false, the holder is concluded. *Stevens and another* v. *Thacker*, Peake, 187. Kenyon, C. J. 1793.

Acc. *Beayne* v. *Beal*, 3 Lev. 240, 1.

308. To prove a consequential loss by the giving up of boxes in a theatre on account of the tortious act of the defendant, the parties must be themselves called; the testimony of the box-keeper is not sufficient. *Ashley* v. *Harrison*, 1 Esp. 48. Kenyon, C. J. 1793.

I. Degree of evidence.

I. (a) *Best or secondary.*

310. Proof of the delivery of an instrument to a servant, and of notice to the master to produce it, will not entitle the opposite party to go into secondary evidence of the contents. *The King* v. *Pearce*, Peake, 75. Kenyon, C. J. 1791.

311. After secondary evidence is admitted, it is governed by the common rules. Therefore, upon notice to the defendant to produce a letter written to him by the plaintiff, the latter cannot read a copy of such letter *taken by himself*. *Fisher* v. *Samuda and another*, 1 Campb. 192. Ellenborough, C. J. 1808.

312. To prove an insurance from fire, the books of the company are not the best evidence. The policy itself must be produced. *Rex* v. *Doran*, 1 Esp. 127. Kenyon, C. J. 1791.

313. Where there are several parts of a deed, of which one is in the hands of the defendant, who has notice to produce it, and the others are inaccessible to the plaintiff, he may give a copy

in evidence. *Doxon* v. *Haigh, et alt.* 1 Esp. 409. Kenyon, C. J. 1795.

314. An attorney cannot be called upon to acknowledge the receipt of a notice to produce papers. *Read* v. *Passer*, 1 Esp. 216. Kenyon, C. J. 1794.

Sed vide *Spenceley* v. *Schulenburgh*, 7 East, 357. S. C. Smith, 325.

315. Where the proceedings in a former cause form the inducement to the action, such proceedings, or a copy of the roll, must be shewn by the plaintiff, though all the papers are in the hands of the defendants, who has had notice to produce them. *Parry, ant.* v. *Collis*, 1 Esp. 399. Kenyon C. J. 1795.

316. Held, that where the copy of a deed is given in evidence, after notice to produce the original, it will be presumed that the instrument was regularly executed. *Doxon* v. *Haigh, et alt.* 1 Esp. 409. Kenyon, C. J. 1795.

Sed vide ante, F. (b) pl. 149, 150.

317. The registered memorial of a deed is not evidence, without notice to produce the deed itself. *Molton qui tam* v. *Harris*, 2 Esp. 549. Kenyon, C. J. 1797.

318. A witness cannot be cross-examined as to the contents of an affidavit which he formerly made, unless such affidavit, or an office copy, be in court. *Sainthill* v. *Bound*, 4 Esp. 74. Kenyon, C. J. 1801.

319. Where two parts of an agreement are signed by both parties, one of which is stamped and is in the possession of the defendant; if he refuse to produce it upon notice, the unstamped part is receivable as secondary evidence of the contents of the other. *Waller* v. *Horsfall*, 1 Campb. 501. Ellenborough, C. J. 1808.

N. The circumstance of the unstamped counterpart's being signed by the parties appears immaterial. *Garnons* v. *Smith*, 1 Taunt. 507.

320. Where one writing is offered as secondary evidence of the contents of another, it is not necessary to prove that one was taken from the other or that they have been collated; it is sufficient if both were copied from the same draft by a person who believes them to be correct. *Ibid.*

Medlicott v. *Joyner*, 1 Mod. 4. acc.

321. Where a will of lands 40 years old, appears after search at Doctors' Commons, to be lost, the probate under the seal of the ecclesiastical court, is not admissible evidence of the contents; such probate, as far as it relates to the disposition of the real estate, being the act of a court which has no jurisdiction over the subject matter. An *examined* copy of the will should be produced. *Doe d. Ash* v. *Calvert*, 2 Campb. 389. Ellenborough, C. J. 1810.

322. But where it was proved that a will of lands had been lost, parol evidence of its contents was received from a person who had heard it read over in the presence of the testator's family on the day of his funeral. *Anonymous*, 2 Campb. 390. Wood, B. Worcester, 1809.

323. An entry in the register book at the custom-house, stating that a certificate of register was granted on an affidavit by A. that he was an owner, is not admissible as secondary evidence of the contents of the affidavit. Some person who has seen the affidavit, and knows it was made by A. must be called. *Teed* v. *Martin and others*, 4 Campb. 90. Ellenborough, C. J. 1814.

I. (b) *Presumptive.*

324. In an action for work done many years since, the defendant may shew that the plaintiff and his fellow-workmen were in the habit of coming for their wages every week, though the witness did not actually see them paid. *Lucas* v. *Novosilieski*, 1 Esp. 296. Eyre, C. J. 1795.

325. Proof that a letter was sent purporting to enclose a bill, and that a bill answering the description in the letter was shortly after in the possession of such parties, is presumptive evidence that he received both letter and bill. *Kieran* v. *Johnson and another, assignees of Macmaster*, 1 Stark. 109. Bayley, J. 1815.

326. It is premature in the defendant to cross examine the plaintiff's witnesses as to the contents of letters which the plaintiff has had notice to produce. *Graham and another* v. *Dyster*, 2 Stark. 21. Ellenborough, C. J. 1816.

327. Proof that the plaintiff drew a check on his banker, payable to the defendant or bearer, the amount of which was received by the defendant himself from the banker, is not even presumptive evidence of a loan. *Cary et alt. executors of Greatorex* v. *Gerrish*, 4 Esp. 9. Kenyon, C. J. 1801.

328. To support an averment in an information for a libel, that Lord St. V. was, *at the time of the publication*, first lord of the admiralty, it is *primâ facie* sufficient to put in the patent of appointment, bearing a date *prior to the publication*. *Rex* v. *Budd*, 5 Esp. 230. Ellenborough, C. J. 1805.

329. Where the vendor of goods is only able to prove the delivery of a package without any evidence of the contents, it will be presumed to have been filled with the cheapest commodity in which he deals. *Clunnes* v. *Pezzey*, 1 Campb. 8. Ellenborough, C. J. 1807.

And see *Armory* v. *Delamirie*, 1 Stra. 505.

330. The presumption that a judgment entered up in 1769, to secure an annuity, has been discharged by payment or release, is not rebutted by evidence that the conusor was in embarrassed circumstances during the remainder of his life, and that, in the opinion of his friends, he never possessed the means of satisfying the debt. *Willaume* v. *Gorges*, 1 Campb. 217. Ellenborough, C. J. 1808.

And see ante, Bond, C.

331. Proof that a stage-coach broke down, and that the plaintiff, a passenger, was greatly bruised, is sufficient to raise the presumption that the accident arose, either from the unskilfulness of the driver, or the insufficiency of the carriage; and it lies upon the defendant, the owner, to negative both these inferences. *Christie* v. *Griggs*, 2 Campb. 79. Mansfield, C. J. 1809.

332. A passenger in a vessel not heard of for two or three years, is presumed to be dead; but whether he was alive on a certain day is to be collected from the circumstances of the voyage. *Watson and wife, administrators of Maxwell* v. *King*, 1 Stark. 121. Ellenborough, C. J. 1815.

333. Where the defendant pleads coverture, and it appears that her husband has been absent from England 12 years, it lies upon her to rebut the presumption of his death, raised by 1 Jac. I. cap. 11 sect. 2. *Hopewell* v. *De Pinna*, 2 Campb. 113. Ellenborough, C. J. 1809.

S. P. per Ellenborough, C. J. in *Doe* v. *Jessen*, 6 East, 85, and 2 Smith, 236. And see Y. B. 38. H. 6, 27. pl. 8 and 9. 5 E. 4. 3 a, pl. 27. Dyer, 329. pl. 13. *Bishop of Salisbury's* case, 10 Rep. 59, a. *Thorne* v. *Rolfe*, 1 Anders. 20. *Throgmorton* v. *Walton*, 2 Roll. Rep. 461. *Smartle* v. *Penhallow*, 2 Lord Raym. 994, 9. *Benson* v. *Olive*, 2 Stra. 920. S. C. differently reported, 1 Barnard. K. B. 348, and Bunb. 284. *Rowe* v. *Hasland*, 1 Bla. 404. *Wilson* v. *Hodges*, 2 East, 312. 3 Vin. Abr. Averment, F. 3 Bla. Comm. 336.

334. In debt on bond against executors of obligor, an inquisition finding that the testator was a lunatic, without lucid intervals, at the period of the execution of the bond, is admissible, though not conclusive evidence. *Faulder* v. *Silk and another, executors of Jervoise*, 3 Campb. 126, more fully, 1 Collinson, 390. Ellenborough, C. J. 1811.

S. P. ruled by Hardwicke, C. in *Sergeson* v. *Sealy*, 2 Atk. 412.

335. An affidavit verifying a muster-roll, upon which it appears that a certain number of apprentices was on board when the vessel *cleared out*, is *primâ facie* evidence that such apprentices were on board when the vessel *sailed*. *Lacon, knight, et alt.* v. *Hooper, et alt.* 1 Esp. 246. Kenyon, C. J. 1794.

336. So an averment in an indictment that J. S. is *now* legally settled in the parish of A. is supported by evidence of his being so settled *shortly* before the preferring of the indictment. *Rex* v. *Tanner, et alt.* 1 Esp. 304. Ashurst, J. Hertford, 1795.

Acc. *Blackstone* v. *Martin*, Latch. 113. S. C. 3 Bulst. 308, 9. And see 2 H. 6, 11 a. *Poyne's case*, Cro. Jac. 214. *Johnson's* case, *Ibid.* 610, 4th exception; *Bridge's* case, *Ibid.* 639. *Ailing's* case, 2 Roll. Rep. 65. Dig. 22, 3, 22. Ante Bankrupt, pl. 71. post, Stamps, B. (a).

337. The non-production of books upon notice, merely entitles the opposite parties to give secondary evidence. It does not authorise the jury to speculate upon the probable contents. *Cooper*

and another v. *Gibbons*, 3 Campb. 364. Gibbs, J. 1813.

338. Acceptance of rent from a third person is not a ground for presuming a surrender. *Copeland* v. *Watts and another, executors of Gubbins*, 1 Stark. 95. Gibbs, C. J. 1815.

I. (c) *Conclusive.*

339. Proof that, at the time when a stage-coach was overturned, there were more passengers than the statute allowed, was admitted to be conclusive evidence that the accident was attributable to that cause. *Israel* v. *Clark and Clinch*, 4 Esp. 259. Ellenborough, C. J. 1803.

K. Negative averments.

340. Where the validity of a seizure of smuggled goods is in issue, it will be presumed that the seizure was *unlawful*. *Aitcheson and another* v. *Madock, gent. one, &c. and another*, Peake, 162. Kenyon, C. J. 1792.

341. Upon an indictment for killing deer *without the consent of the owner*, it is incumbent on the prosecutor to shew that such consent was *not* given. *Rex* v. *T. Rogers*, 2 Campb. 654. Lawrence, J. Worcester, 1811.

Acc. *Atkinson* v. *Hunter*, Lutw. 1359. *Monke* v. *Butler*, 1 Roll. Rep. 83. *Lord Halifax's* case, Bull. N. P. 298. S. C. 12 Vin. Abr. Evidence, S. b. 3. *Rex* v. *Coombs*, Comberb. 57. *Powel* v. *Milbank*, 2 Bla. 851, 3. S. C. 3 Wils. 355, 66. *Aglionby* v. *Towerson*, T. Raym. 400. *Williams* v. *East India Company*, 3 East, 192. Post, Misdemeanour, pl.

342. Where a servant has been accustomed to account with her master for monies received to his use, without any written vouchers, it is not sufficient, to charge the servant, to shew that certain sums have been received by her; it lies upon the master to prove further, that she has *not* paid them over. *Evans* v. *Winifred Birch*, 3 Campb. 10. Ellenborough, C. J. 1811.

Acc. *Potts* v. *Potts*, 1 Vern. 208. *Anon. Ib.* 136. And see F. N. B. 119. D. But see *Wagstaffe* v. *Bedford*,* 1 Vern. 95.

As to negative averments, see ante, I. (b) pl. 334. Action on the case, pl. 41, 57. Apprentice, pl. 2 Attorney, pl. 40. Post, Insurance, L. (a). Limitation, A. (c). Smuggling, pl. 3. Vendor and Purchaser, F. See also Vinn. Select. Jur. Quæst. lib. 2. cap. 12. 3 Bla. Comm. chap. 23. Pothier, Traité du Contrat d'Assurance, chap. 1. sect. 2. num. 24, 78. Quinct. lib. 3. cap. 6. pp. Dig. 22, 3, 5. *Ibid.* 22, 3, 6. *Ibid.* 22,3, 8. *Ibid.* 22, 3, 13. *Ibid.* 22, 3, 18, 1. *Green* v. *Brown*, 2 Stra. 1199. *Frontine* v. *Frost*, 3 Bos. and Pull. 302. 12 Vin. Abr. (T. b) 64. *Smith* v. *Taylor*, 1 N. R. 213. Co. Litt. 6, b. *Thorne* v. *Rolfe*, 1 And. 20. S. C. Moore, 14.

EXECUTION.

(And see Sheriff.)

A. Fieri facias.

(a) *What may be taken under it.*
(b) *Irregular.*
(c) *Fraudulent.*
(d) *Title of sheriff's vendee.*
(e) *Landlord's claim for rent.*
(f) *Sheriff's poundage.*
(g) *Liability of sheriff.*

B. Priority in executions.

A. Fieri facias.

(And see Pleading, H. (a).)

A. (a) *What may be taken under it.*

1. Executrix used goods of testator as her own, and married; after which the husband and wife treated the goods as their own. Held, that the user subsequent to the marriage, was such a conversion of the goods as subjected them to an execution against the husband. *Quick and wife, executrix,* v. *Staines, knt. sheriff of London*, 2 Esp. 657. Eyre, C. J. 1798.

Rule for setting aside nonsuit was discharged on the ground that the first user

by the executrix, *dum sola*, amounted to a *devastavit*. 1 Bos. and Pull. 293. And see Manning's Exch. Practice. 548, (n) *Freeman* v. *Fairlie*, 3 Meriv. 44.

2. In an action for a false return of *nulla bona*, where the defence set up is, that the goods were the property of the domestic servant of a foreign minister, it is open to the plaintiff to shew that the servant's appointment is merely colourable. *Delvalle* v. *Plomer, knt. and another*, 3 Campb. 47. Ellenborough, C. J. 1811.

A. (b) *Irregular.*

3. An execution cannot be impeached at nisi prius, on the ground that the judgment was not revived by *scire facias*. *Habberton and another, assignees of Grave* v. *Wakefield*, 4 Campb. 58. Ellenborough, C. J. 1814.

4. Or on the ground that more than entire term intervened between the testa and return of the writ. *Ibid.*

As to this species of irregularity, vide Manning's Exch. Pract. 17.

5. The goods of A. cannot be taken for the debt of B. although A. represent herself as B.'s wife. *Edwards* v. *Bridges and another*, 2 Stark. 397. Abbott, C. J. 1818.

A. (c) *Fraudulent.*

See ante, EVIDENCE, pl. 247, 275.

A. (d) *Title of Sheriff's vendee.*

6. A party entitling himself under an assignment by the sheriff, of goods taken in execution, must produce the judgment upon which the *fi. fa.* issued. *Hoffman, assignee of Phelps* v. *Pitt, gent.* 5 Esp. 22. Ellenborough, C. J. 1803.

Contra *Amner* v. *Lodington*, 8 Rep. 96, b. *Ibid.* 143, a. *Eyre* v. *Woodfyn*, 1 Anders. 277, 2 Bac. Abr. 740, Execution, Q. Tidd. 1070, 1225, 6. 1 Vez. 195. And see *Savage* v. *Smith*, 2 Bla. 1101, 4. Ante, EJECTMENT, pl. 21, 22.

A. (e) *Landlord's claim for rent.*

7. Where the landlord accepts an undertaking from the sheriff's officer to pay him a year's rent, and then suffers him to remove the goods, he cannot sue the sheriff upon 8 Ann, cap. 14, sect. 1. though the undertaking prove to be invalid, from not expressing the consideration. *Rotherey* v. *Wood and Atkins, esquires*, 3 Campb. 24. Ellenborough, C. J. 1811.

N. That such an undertaking is not within the statute, see post, FRAUDS, STATUTE OF, D. (a).

8. A landlord cannot maintain an action for *money had and received* against the sheriff, who sells under a *fi. fa.* without reserving the arrears of rent. *Green and others, assignees of Southey* v. *Austin*, 3 Campb. 260. Ellenborough, C. J. 1812.

And see *Smith* v. *Russell*, 3 Taunt. 400. *Hoskins* v. *Knight*, 1 M. and S. 245.

A. (f) *Sheriff's right to poundage.*

9. Sheriff is entitled to retain his poundage, where execution is set aside for irregularity. *Bullen* v. *Ansley and Smith, sheriffs of London*, 6 Esp. 111. Ellenborough, C. J. 1807.

So upon a *ca. sa.* where defendant is insolvent. *Anon.* in K. B. 1785, Imp. Sher. 100. Or where he is charged in execution. Tidd. 1095, *Taylor* v. *Ward*. And see post, SHIP, G. 1. n. MSS. vol. D.

A. (g) *Liability of sheriff.*

10. After a false return of *nulla bona*, the plaintiff takes the defendant upon a *ca. sa.* This is no discharge to the sheriff. *Wordall* v. *Smith and another, sheriff of Middlesex*, 1 Campb. 332. Ellenborough, C. J. 1807.

B. PRIORITY IN EXECUTIONS.

11. Where a *fi. fa.* is delivered to the sheriff, with directions not to levy till a future day, and in the mean time another *fi. fa.* is brought to him, he must execute the latter writ first. *Kempland* v. *Macauley and another*, Peake, 65, 6. Kenyon, C. J. 1791.

S. C. not S. P. 4 T. R. 436. Acc. *Payne* v. *Drewe*, 4 East, 523. S. C. 1 Smith, 170.

EXECUTORS AND ADMINISTRATORS.

(And see ante, ACTION, pl. 10, 11. post, INSURANCE, pl. 32. PENAL ACTION, A. (c) 1.)

A. AUTHORITY.

B. ASSETS.

(a) *What shall be.*

(b) *How to be distributed.*

C. EXECUTOR DE SON TORT.

(a) *Who shall be.*

D. PLEADINGS BY EXECUTORS.

A. AUTHORITY.

1. Stated to have been held that a plaintiff suing as executor, in trover for a conversion in his own time, need not prove the death of his testator, where there is no plea of *ne unques executor* on the record. *Lloyd, executrix,* v. *Finlayson,* 2 Esp. 564. Kenyon, C. J. 1797.

But see *Hunt* v. *Stevens,* 3 Taunt. 113.

2. And it was *ruled* that if a person so suing, make a profert in curiam, the instrument need not be produced. *Watson and another, administratrix of Maxwell,* v. *King,* 4 Campb. 272. Ellenborough, C. J. 1815.

On the ground that the plaintiff had offered to produce the instrument, the court refused a rule for a new trial. *Ibid.*

S. C. not S. P. 1 Stark. 121.

And see *Allen* v. *Dundas,* 3 T. R. 125. 1 Saund. 275, n. 3. 2 Saund. 47, k. *Mears* v. *Marshfield,* 2 Lord Raym. 824. *Blainfield* v. *March,* 7 Mod. 141. S. C. 1 Salk. 285. *Elden* v. *Keddell,* 8 East, 187. *Newman* v. *Leech,* Barnes, 365. *Franks's* case, Noy's Maxims, 137. *Thynne* v. *Protheroe,* 2 M and S. 553.

B. ASSETS.

B. (a) *What shall be.*

(And see ante, EVIDENCE, pl. 245, 277.)

4. Produce of sale of good will of public-house, held on by administratrix for some time as tenant at will, is assets. *Worral* v. *Hand, administratrix,* Peake, 74. Kenyon, C. J. 1791.

And see *Jury* v. *Woodhouse,* Barnes, 333. 12 Vin. 206, pl. 9.

5. Executor refers a party to J. S. for information respecting the effects of testator. An admission of assets by J. S. is conclusive. *Williams, spinster,* v. *Innes and others, executors, &c.* 1 Campb. 364. Ellenborough, C. J. 1808.

6. Inventory exhibited by administrator in the spiritual court, is evidence of assets to the amount therein stated. *Hickey* v. *Hayter, administratrix,* 1 Esp. 313. Kenyon, C. J. 1795.

And see *Parker* v. *Clere,* Co. Ent. 128, 9.

7. Sperate debts are not assets without some presumptive evidence of payment. *Giles and Headings* v. *Dyson and Greenwell, administrators of Seward,* 1 Stark. 32. Ellenborough, C. J. 1815.

8. After putting in an inventory, it lies upon the executor to discharge himself of the items. *Ibid.*

B. (b) *How to be distributed.*

(And see post, INSOLVENT, C.)

9. Executors cannot be charged with a service performed for the testator in expectation of a legacy. *Lesage* v. *Coussmaker and others, executors,* 1 Esp. 187. Kenyon, C. J. 1794.

10. As against creditors, disbursements for the children of the deceased since his death will not be allowed. *Giles and Headings* v. *Dyson and Greenwell, administrators of Seward,* 1 Stark. 32. Ellenborough, C. J. 1815.

11. Semble, that an executor is entitled to reasonable charges for collecting the debts. *Ibid.*

12. Payment of the residuary effects to the legatee, after the year from testator's death, without notice of the plain-

tiff's demand, will support a plea of *plene administravit*. *Governor and Company of Chelsea Waterworks* v. *Cowper*, 1 Esp. 276. Kenyon, C. J. 1795.

And see *Ecles* v. *Lambert*, Aleyn. 38. 1 Mod. 177; post, TRUSTEE, pl. 2.

11. An executor is justified in paying bond debts in preference to a debt on a judgment recovered against the testator, *but not docketed*. *Hickey* v. *Hayter*, 1 Esp. 313. Kenyon, C. J. 1795.

And the court set aside a nominal verdict for the plaintiff. 6 T. R. 384.

Acc. *Steele* v. *Rorke*, 1 Bos. & Pull. 307. And see 2 Saund. 7, n. (5). Tidd. 967.

12. Executors having assets, are liable for the expenses of the funeral, although they have given no orders respecting it. *Tugwell* v. *Heyman and another, executrix, and executor, &c.* 3 Campb. 298. Ellenborough, C. J. 1812.

Qu. whether in such case the plaintiff would be entitled to a *general* judgment?

C. EXECUTOR DE SON TORT.

C. (a) *Who shall be.*

13. A. and B. are executors of C.; upon the death of A., D. his executor, in the life time of B., possesses himself of the effects of C. Semble, that D. cannot be sued by a creditor of C. *Hall* v. *Elliott, executor of E. Coddon, widow, executrix of P. Coddon*, Peake, 86. Kenyon, C. J. 1791.

Sed vide Read's case, 5 Co. 33, *b*.

14. A person is not chargeable as executor *de son tort*, who acts under the authority of the rightful executor. *Ibid.*

And see Anon. Cro. El. 472.

15. Or who takes possession of the goods of the deceased, under a fair claim of right. *Femings* v. *Jarrat, executor of Peat*, 1 Esp. 335. Kenyon, C. J. 1795. LANDLORD AND TENANT, B. (d).

16. But where A. appoints B., C., and D., his executors, and D. alone proves the will, and appoints E. his executrix, who administers the estate of A., under the direction of B.; she is liable as executrix *de son tort* of A. *Cottle* v. *Elizabeth Aldrich, executrix of Charles Aldrich*, 1 Stark. 37. Le Blanc, J. 1815.

And the court of K. B. refused a rule for a new trial. *Ibid.*

D. PLEADINGS BY EXECUTORS.

(And see ante, A. pl. 1, 2.)

17. In an action for premiums due to the plaintiff's testator, the broker cannot set off returns of premium accruing after the death of the underwriter. *Houston and others, executors of Houston*, v. *Robertson*, 1 Holt. 88. Gibbs, C. J. 1815.

And the court of C. P. refused a rule to set aside the verdict. *Ibid.*

And see *Minett* v. *Forrester*, 4 Taunt. 541; *Koster* v. *Eason*, 2 M. and S. 112.

18. Under a plea of *plene administravit* to an action of debt on a judgment recovered against intestate, *but not docketted*, payment of bond debts may be given in evidence. *Hickey* v. *Hayter, administratrix*, 1 Esp. 313. Kenyon, C. J. 1795.

And the court of K. B. set aside a nominal verdict, which had been taken for the plaintiff. 6 T. R. 384.

Acc. *Steele* v. *Rorke*, 1 Bos. and Pull. 307. And see *Baker* v. *Baker*, Tidd. 967, 2 Saund. 9, n. (5). *Sawyer* v. *Mercer*, 1 T. R. 690.

19. If an executor plead a retainer, and a judgment recovered, which together cover the assets, it is sufficient for the plaintiff to falsify either claim. *Campion* v. *Bentley, administrator of Samuel Bentley*, 1 Esp. 343. Eyre, C. J. 1795.

And see *Shelly* v. *Sackville*, Moore, 2, pl. 3.

FAIRS AND MARKETS.

1. An uninterrupted user during 20 years, gives a *primâ facie* right to a fair or market; and affords a sufficient answer to an indictment for a nuisance to a highway. *The King* v. *Smith et alt.* 4 Esp. 109. Ellenborough, C. J. 1802.

2. But the party may be proceeded against for usurping the franchise. *Ibid.*

And see *Yard* v. *Ford*, 2 Saund. 172, *ibid.* 175, n. 2.

FELONY.

(And see ante, ACTION ON THE CASE, A. (h) Evidence, pl. 284, 5.)

A. WHAT SHALL BE.

(a) *Manslaughter.*

(b) *Forgery.*

(c) *Embezzlement.*

(d) *Felony, or misdemeanour.*

B. PLEADINGS.

(a) *Indictment where necessary.*

(b) *Form of indictment.*

C. EVIDENCE.

A. WHAT SHALL BE.

A. (a) *Manslaughter.*

(And see post, pl. 29.)

1. An overseer who should remove a sick pauper without that care and attention his situation required, whereby his death was accelerated even for an hour, would be guilty of manslaughter. Dict. per Abbott, J. in *Rex* v. *Bellworthy*, Wilts. Spring Assizes, 1818. And see Y. B. H. 2 E. 3, fo. 18, pl. 1.

A. (b) *Forgery.*

2. A person who makes a copy of a receipt, interpolating the words "in full of all demands," and produces such false copy upon a suggestion of the loss of the original, is guilty of forgery. *Upfold* v. *Leit*, 5 Esp. 100. Ellenborough, C. J. 1804.

4. A takes a bank-note in the course of trade, and passes it to B., from whom it is detained at the bank as forged. An inspector carries the note to A., who pays B. the amount, and taking up the note, refuses to re-deliver it to the inspector. There is not even probable cause for charging A. with feloniously having the note in his possession, knowing it to be forged. *Brooks* v. *Warwick*, 2 Stark. 380. Ellenborough, C. J. 1818.

A. (c) *Embezzlement.*

5. An accountant and treasurer, employed by overseers at a yearly salary, to receive and pay money, is a clerk and servant within 39 Geo. III. cap. 85. *Rex* v. *Squire*, 2 Stark. 349. Bayley, J. York, 1818.

6. A servant who having received money from his master, to purchase articles, charges more than he pays, is guilty of embezzlement, within this act. Per Holroyd, J. in *Braddick* v. *Croad*, Exeter Spring Assizes, 1819.

A. (d) *Felony or misdemeanour.*

7. That which is declared by statute to be a misdemeanor, cannot be a felony. *Rex* v. *Walford*, 5 Esp. 62. Hotham, B. Chelmsford, 1803.

B. PLEADINGS.

B. (a) *Indictment, where unnecessary.*

8. If a verdict be found for the defendant, on a justification of words of felony, the plaintiff may be arraigned without the intervention of a grand jury. *Cook* v. *Field*, 3 Esp. 133. Kenyon, C. J. 1788.

B. (b) *Form of indictment.*

9. Where the property in goods might have been easily ascertained, the court will not direct a conviction on a count laying the property in *persons unknown*. *Rex* v. *Robinson*, Holt, 595. Richards, C. B. Durham, 1817. Post, pl. 16.

10. A count charging the prisoner with having counterfeit money in his possession at the time he uttered other counterfeit money, must contain a distinct averment of the fact of uttering. *Rex* v. *Kelly and others*, 3 Esp. 28. Buller, J. Hertford, 1799.

11. An allegation that when the prisoner *so* uttered the said piece of counterfeit money (referring to a former count) he had other counterfeit money in his possession, is insufficient. *Ibid.*

12. Several felonies of the same nature may be charged in the same indictment. *Rex* v. *Jones*, 2 Campb. 131. Ellenborough, C. J. 1808.

But see *Young* v. *The King*, 3 T. R. 106. And see *R.* v. *Kingston*, 8 East, 41.

13. But the judge will, in his discretion, confine the evidence to a single offence. *Ibid.*

14. An indictment upon 43 Geo. III. cap. 58. sect. 2. for administering a substance with intent to procure abortion, need not aver that the substance was in fact noxious, or that the woman was actually with child. *Goldsmith's* case, 3 Campb. 75. Lawrence, J. Gloucester, 1811.

15. And, if averred, these facts need not be proved. *Ibid.*

N. So upon an indictment for *poisoning*, the poisonous substance need not be proved as laid; 2 Hale, P. C. 291. 1 Hargr. State Trials, 118, *Overbury's* case. And see *Mackally's* case, 9 Co. Rep. 61, 67. 2 Inst. 119.

16. An indictment against an accessary to a felony committed by *a person unknown*, cannot be supported, if it appears that the principal felon acknowledged his guilt before the grand jury. *Rex* v. *Walker*, 3 Campb. 264. Le Blanc, J. Gloucester, 1812. Ante, pl. 9.

17. An averment of the conviction of the principal felon, is supported by the production of the record of his attainder, however erroneous the judgment may be. *Rex* v. *John Baldwin*, 3 Campb. 265. Thomson, B. Monmouth, 1812.

C. EVIDENCE.

18. On an indictment for arson, the books of an insurance company are not evidence of an insurance, unless notice has been given to produce the policy. *Rex* v. *Doran*, 1 Esp. 127. Kenyon, C. J. 1791.

19. On an indictment for forging a seaman's will, the will was admitted in evidence, without shewing that the probate granted thereon had been repealed. Per Bailey, J. and Garrow, B., O. B. Dec. 1817.

And the ruling having been confirmed by the twelve judges, the prisoner was executed.

20. If stores with the king's mark are found in the prisoner's possession, it lies upon him to discharge himself, either by producing a navy-board certificate, or shewing that the articles were purchased from a person who may be presumed to have had a certificate. *Rex* v. *Banks*, 1 Esp. 144, 6. Kenyon, C. J. 1794.

21. On an indictment for stabbing with intent to resist lawful apprehension, it must be shewn that the party apprehending, was either present at the committing of the offence, or came armed with a warrant. *Rex* v. *Dyson*, 1 Stark. 246. Le Blanc, J. York, 1816.

And see post, OFFICER, B.

22. A felon may be convicted on the single testimony of an accomplice. *Rex* v. *Jones*, 2 Campb. 131. Ellenborough, C. J. 1809.

Acc. *Atwood's* case, 2 Leach. Cro. Ca. 521, *Durham's* case, *Ibid.*

23. Upon an indictment for putting away a forged bank-note, knowing the same to be forged, evidence that the prisoner has passed another note of the same manufacture, and that several such notes have been brought to the bank with different indorsements in his handwriting, is evidence from which the jury may infer a knowledge, that the note mentioned in the indictment was forged. *Rex* v. *Edward Ball*, 1 Campb. 324. Heath, J. Horsham, 1808.

S. P. per all the judges. *Rex* v. *Tattersal*, 1 N. R. 93.

24. Papers found at the lodgings of the prisoner, and shewn to have been written by him before the crime was committed, were offered to prove his insanity, but were rejected on the ground that what a party has written, though evidence against him, cannot be evidence for him. *Rex* v. *Casaux*, Garrow, B., Old Bailey, May 1818.

25. Indictment against a bankrupt for secreting his effects, avers a petitioning creditor's debt to three executors of A. If the debt accrued after A.'s death, the business being continued by the executors for the benefit of the estate, it must be shewn that all three were concerned in carrying it on. *Rex* v. *Barnes*, 1 Stark. 243. Le Blanc, J. York, 1816.

26. A general admission by the bankrupt that he was indebted to "the executors of A." is not sufficient. *Ibid.*

27. Upon an indictment on 42 Geo. III. cap. 107. sect. 1. for killing deer in an inclosed park without leave of the owner, it lies upon the prosecutor to prove that such consent was not given.

Rex v. *T. Rogers*, 2 Campb. 654. Lawrence, J. Worcester, 1811.

And see *Banks* v. *Peckham*, Lill. Ent. 302.

28. Where the property in goods might have been easily known, there can be no conviction on a count laying it in *persons unknown*. *Rex* v. *Robinson*, Holt, 595. Richards, C. B. Durham, 1817.

29. Depositions of the deceased, though not taken wholly in the prisoner's presence, are admissible, if the party was re-sworn, and the depositions read and signed in his presence. *R.* v. *Smith*, 2 Stark. 208, and Holt, 614. Richards, C. B. Newcastle, 1817.

FISHERY.

(And see ante, EVIDENCE, pl. 32, post, PLEADING, D.)

1. A man may prescribe for a *several* fishery in a navigable river, as appurtenant to a manor, without shewing a grant from the crown. *Rogers and another* v. *Allen*, 1 Campb. 312. Heath, J. Chelmsford, 1811.

And see *Kinnersley* v. *Orpe*, Dougl. 56; Anon. Hardres. 407; Keilw. 53. pl. 11. MSS. D. 198.

2. A several fishery in a navigable river is divisible. It may be abandoned to the public as to the taking of floating fish, and preserved as to the dredging for oysters. *Ibid.*

Sed vide Hard. 407.

FOREIGN ATTACHMENT.

A. TO WHAT PERSONS THE CUSTOM EXTENDS.

(a) *In respect of residence.*

(b) *In respect of their relation to the suit.*

B. HOW AVAILABLE IN COLLATERAL PROCEEDINGS.

A. TO WHAT PERSONS THE CUSTOM EXTENDS.

A. (a) *In respect of residence.*

1. The parties must be resident in London. *Lord Barrymore, administrator*, v. *Taylor*, 1 Esp. 327. Kenyon, C. J. 1795.

Acc. *North* v. *Winskell*, 2 Lutw. 977, 984; *Hern* v. *Stubbers*, Latch. 208. 1 Roll. Ab. 554, pl. 4; *Frumpton* v. *Pettis*, 3 Lev. 23.

Sed vide Jenk. 139, first resolution. *Andrews* v. *Clarke*, Comb. 109; *Mallum* v. *Herne*, 2 Show. 507, (492).

2. The sending of goods from a shop in London, to be put on board a vessel lying beyond the bounds of the city, is a sufficient delivery to a foreign vendee within the city, to give the mayor's court jurisdiction. *Huxham* v. *Smith*, 2 Campb. 19. Ellenborough, C. J. 1809.

And see *Moravia* v. *Sloper*, Willes, 30, *ibid.* 36, n; *Morris* v. *Ludlam*, 2 H. Bla. 362; *Banks* v. *Self*, 5 Taunt. 234.

A. (b) *In respect of their relation to the suit.*

3. Semble that a debt due to the estate of a deceased person, cannot be attached. *Lord Barrymore, administrator*, v. *Taylor*, 1 Esp. 327. Kenyon, C. J. 1795.

Sed vide *Marshal* v. *Wilkinson*, Dyer, 246, a.; *Spink* v. *Tenant*, 1 Roll. Rep. 105; *Hodge* v. *Cox*, Cro. El. 843; *Smith* v. *Ridges*, T. Jones, 165; *Horsey* v. *Turges*, 1 Lev. 307. S. C. more fully reported, 1 Vent. 111; *Masters* v. *Lewis*, Skinner, 516. S. C. 3 Salk. 49. S. C. 1 Lord Raym. 56; *Fisher* v. *Lane*, 2 Bla. 834. S. C. more fully reported, 3 Wils. 297.

B. HOW AVAILABLE IN COLLATERAL PROCEEDINGS.

4. To shew that the defendant has paid a sum of money to a creditor of the plaintiff, as garnishee of the process

from the mayor's court, the record of the judgment with an entry of satisfaction is conclusive. *Huxham* v. *Smith*, 2 Campb. 19. Ellenborough, C. J. 1809.

5. And no evidence of collusion between the plaintiff in the attachment and the garnishee can be admitted. *Ibid.*

And see *M'Daniel* v. *Hughes*, 3 East, 367; Turbill's case, 1 Saund. 67, n. (1). *Parrot* v. *Benn*, Barnes, 195.

6. But such record is only *presumptive* evidence, that the debt for which the former action was brought, arose within the jurisdiction of the mayor's court. *Ibid.*

And see *Andrews* v. *Clarke*, Carth. 25, 6.

FOREIGN JUDGMENTS.

A. HOW PROVED.

B. WHEN BINDING.

A. HOW PROVED.

1. In an action on a colonial judgment it is not sufficient to prove the judge's hand-writing without proof of the seal. *Henry* v. *Adey*, 4 Esp. 229. Ellenborough, C. J. 1803.

And the court of K. B. concurred with the chief justice. 3 East, 221.

2. Or it must be proved that the court has no seal, and that the document produced was authenticated in the usual manner. *Alves* v. *Bunbury*, 4 Campb. 28. Ellenborough, C. J. 1814.

And see *Walker* v. *Witter*, Dougl. 1; *Collins* v. *Lord Mathew*, 5 East, 473. S. C. 1 Smith, 25.

3. If the court has a seal, though old and disused, it cannot certify without seal. *Cavan* v. *Stewart*, 1 Stark. 525. Ellenborough, C. J. 1816.

4. Judgment in C. P. in the island of Tobago, sufficiently proved by a copy of the judgment, and by a witness, who had been resident in the island, swearing to the hand-writing of the chief justice, and saying that he would have acted under the seal appended to it, as the seal of the island. *Buchanan* v. *Rucker*, 1 Campb. 63. Ellenborough, C. J. 1807.

B. WHERE BINDING.

5. To entitle a defendant to avail himself of a foreign attachment, in a colonial court, he must shew that the plaintiff was summoned to appear in the court, or at least that he once resided within the jurisdiction. *Cavan* v. *Stewart, ubi supra.*

6. Where a colonial chancery has decreed, that A. pay to B. a certain sum, "first deducting thereout A.'s costs, to be taxed by the master," such taxation is necessary, to complete the decree. *Sadler* v. *Robins*, 1 Campb. 253. Ellenborough, C. J. 1808.

See *Hall* v. *Odber*, 11 East, 118.

7. But an action lies here upon the decree of such court for the payment of a definite sum. *Ibid.*

8. No action can however be maintained on the judgment of a colonial court, if the defendant were never served with process, and had no opportunity of defending the suit, notwithstanding the practice of such court to proceed upon a return of "served by nailing a copy of the declaration to the court-house door." *Buchanan* v. *Rucker, ubi supra.*

And see post, JURISDICTION, pl. 3. *Fisher* v. *Lane*, 3 Wils. 297, 2 Bla. 834. S. C. *M'Daniel* v. *Hughes*, 3 East, 367.

FOREIGN LAWS.

(And see ACTION ON THE CASE, pl. 72.)

1. In an action for money paid, to prevent the defendant, an infant, from being arrested in Scotland, it lies upon him to prove, that by the laws of that country, his infancy would have been a defence to the present action, if it had been brought there. *Male* v. *Roberts*, 3 Esp. 163. Eldon, C. J. 1800.

And see *Mure* v. *Kaye*, 4 Taunt. 34. As to arrests for debt in the Isle of Man, see Appendix VII.

2. Where the validity of an agreement is impeached by an objection founded on the written law of the country in which it was made, the law must be proved by the production of an authenticated copy. *Clegg* v. *Levy*, 3 Campb. 166. Ellenborough, C. J. 1812.

3. S. P. *Millar* v. *Heinrick*, 4 Campb. 155. Ellenborough, C. J. 1812.

4. And it is stated to have been held, that the *unwritten* law of a foreign country, can only be proved by documents properly authenticated. *Boehtlinck* v. *Schneider, (Inglis) assignee of Crane*, 3 Esp. 58. Kenyon, C. J. 1799.

And that the court of K. B. refused or discharged a rule for a new trial, moved for on the supposed admissibility of parol evidence. *Ibid.*

Sed vide 3 Campb. 167.

5. An instrument of divorce under a seal, purporting to be that of the synagogue at Leghorn, cannot be given in evidence without proving the law of the country by witnesses. *Ganer* v. *Lady Lanesborough*, Peake, 17. Kenyon, C. J. 1790.

And see *Fremoult* v. *Dedire*, 1 P. Williams, 429; *Feaubert* v. *Turst*, 1 Brown, P. C. 38.

FRAUDS, STATUTE OF.

A. Leases.

(a) *When binding.*
(b) *How assigned.*
(c) *How surrendered.*

B. Sale of lands.

(a) *What a sufficient signing.*
(b) *Agent, who shall be.*

C. Sale of goods.

(a) *What shall be a sufficient delivery.*
(b) *Signing by the party, what sufficient.*
(c) *Act of agent, where binding.*

D. Promises on behalf of third persons.

(a) *Original undertaking.*
(b) *Collateral undertaking.*

E. Will of lands.

A. Leases.

(And see Landlord and tenant.)

A. (a) *When binding.*

1. An indorsement on the draft of a lease, signed by the intended lessee, whereby he requests the lessor to dispose of the premises, *as it will be inconvenient for him to fulfil his agreement*, satisfies the statute. *Shippey* v. *Derrison*, 5 Esp. 191. Ellenborough, C. J. 1805.

2. A verbal agreement to take lodgings from a future day, is an agreement relating to the interest in land, and may be abandoned where there has been no part execution by entering on the premises, although the lessor, before the time is arrived for taking possession, has, at the request of the lessee, removed the advertisement of lodgings from his window. *Inman* v. *Stamp*, 1 Stark. 12. Ellenborough, C. J. 1815.

A. (b) *How assigned.*

3. Assignment of a lease from year to year, otherwise than by deed or note in writing, is void. *Botting* v. *Martin*, 1 Campb. 318. Macdonald, C. B. Sussex, 1808.

A. (c) *How surrendered.*

4. Nor can such a lease be surrendered to the lessor by parol; therefore a yearly tenant who quits in the middle of a quarter, under a verbal licence from the landlord, is bound to pay rent to the end of the year. *Mollett* v. *Brayne*, 2 Campb. 103. Ellenborough, C. J. 1809.

And the court refused a rule for a new trial. *Ibid.*

N. The premises were unfurnished apartments in a house occupied by the lessor. The tenant quitted on 29th December, and the apartments remained unoccupied till after lady-day, so that another year had begun without a regular notice to quit; but the action was brought in *April*. S. C. MSS.

5. S. P. *Thomson* v. *Wilson*, 2 Stark. 381. Ellenborough, C. J. 1818.

And see *Sampleys* v. *Dupuis*, 3 Taunt. 410.

B. Sale of lands.

B. (a) *What a sufficient signing.*

6. An agreement for the sale of a house in the hand-writing of the vendor, beginning "I. A. B. agree to sell, &c." but subscribed only by the vendee, is binding on both parties. *Knight* v. *Crockford*, 1 Esp. 189. Eyre, C. J. 1794.

S. P. as to a will. *Lemayne* v. *Stanley*, 3 Lev. 1.

Acc. Vinn. Inst. Heineccii, 292, n. 2. And see 1 Fonbl. Tr. Eq. 190. *Allen* v. *Bennet*, 3 Taunt. 169; *Welford* v. *Beezley*, 1 Wils. 118; *Cooke* v. *Tombs*, 2 Anst. 420.

B. (b) *Agent, who shall be.*

7. An auctioneer is not an agent for both parties in a sale of lands; and an entry made by him will not bind the bidder. *Stansfield* v. *Johnson*, 1 Esp. 101. Eyre, C. J. 1794.

8. S. P. ruled in *Walker* v. *Constable*, 2 Esp. 659. Eyre, C. J. 1798.

And the court of C. P. discharged a rule for setting aside nonsuit. *Ibid.* and 1 Bos. and Pull. 306.

S. P. *Buckmaster* v. *Harrop*, 7 Ves. 341. Sed vide S.C. 13 Ves. 456, 73. *Coles* v. *Trecothick*, 9 Ves. 234, 49. S. C. 1 Smith, 233, 51; *Waller* v. *Hendon*, 5 Vin. Abr. 524, pl. 45; *Emmerson* v. *Heelis*, 2 Taunt. 38, 43; *Hinde* v. *Whitehouse*, 7 East, 559, 65. S. C. 3 Smith, 528, 32; *White* v. *Proctor*, 4 Taunt. 209; *Clinan* v. *Cooke*, 1 Sch. and L. 31.

9. Nor is the rescinding of a contract so made, a sufficient consideration for a new promise. *Walker* v. *Constable*, *ubi supra*.

See *Baker* v. *Smith*, T. Raym. 400, cited, as to a promise in consideration of discharging the defendant from a promise of marriage.

C. Sale of Goods.

C. (a) *What shall be a sufficient delivery.*

(And see Stoppage in transitu, vendor and purchaser, B.)

10. An order from the vendor for the delivery of goods served upon his warehouseman, is a sufficient delivery to the vendee. *Searle et alt.* v. *Keeves*, 2 Esp. 598. Eyre, C. J. 1797.

11. So the taking of a sample as part of the bulk sold, is a part delivery within the statute. *Talver and another* v. *West*, Holt, 178. Gibbs, C. J. 1816.

12. So the delivery of such sample to the purchaser's agent. *Klinitz* v. *Surry*, 5 Esp. 267. Ellenborough, C. J. 1805.

S. P. *Hinde* v. *Whitehouse*, 7 East, 558. 3 Smith, 528, S. C.

13. Upon a sale of wine, vendor's clerk cuts off the spills from the casks, and marks them with the purchaser's initials in the presence of both parties. This is a sufficient delivery. *Anderson* v. *Scot*, 1 Campb. 235, n. Ellenborough, C. J. 1806.

14. The shipping of goods in the same manner as in previous dealings, is an *acceptance* and *actual receipt* by the purchaser, within the statute of frauds. *Hart and another* v. *Sattley*, 3 Campb. 528. Chambre, J. 1814.

See *Astey* v. *Emery*, 4 M. & S. 262.

C. (b) *Signing by the party, what sufficient.*

15. Semble, that the delivery of a bill of parcels, in which the name of the vendors is *printed*, is sufficient. *Saunderson* v. *Jackson and Hankin*, 3 Esp. 180. Eldon, C. J. 1800.

S. P. acc. *Schneider* v. *Norris*, 2 M. & S. 286.

16. At all events, a letter signed by the vendor referring to the order, will take the case out of the statute. *Ibid.*

And the court of C. P. discharged a rule for a new trial. 2 Bos. and Pull. 238.

And see *Allen* v. *Bennet*, 3 Taunt. 169. 1 Fonb. Treat. Eq. 190. *Welford* v. *Beezley*, 1 Wils. 118.

17. A note signed by the vendor only, *and not specifying the name of the vendee*, is insufficient. *Champion* v. *Plummer*, 5 Esp. 240. Mansfield, C. J. 1805.

And the court discharged a rule for setting aside nonsuit. 1 N. R. 252.

As to the second point, see *Egerton* v. *Matthews*, 6 East, 307. Selw. N. P. 773, n. 13. *Allen* v. *Bennet*, 3 Taunt. 169.

18. Where several pieces of goods are bought at the same time, but at separate prices, and the purchaser writes his name upon one of the pieces for the purpose of denoting that he has bought it, the sale is binding for the piece that is marked, but not for the others. *Hodgson* v. *Le Bret*, 1 Campb. 233. Ellenborough, C. J. 1808.

19. Where the same broker is employed by seller and buyer, the entry in the broker's book, signed by him, binds the bargain. Neither party, therefore, can disaffirm the contract by refusing to accept from the broker the *bought and sold* notes, which are merely copies of such entry. *Heyman* v. *Neale*, 2 Campb. 337. Ellenborough, C. J. 1809.

20. But where the vendor countermands the authority of the broker before the contract is reduced into writing, though after a verbal agreement for the sale of the goods, no action will lie for the non-delivery. *Farmer* v. *Robinson*, 2 Campb. 339, n. Ellenborough, C. J. 1805.

C. (c) *Act f agent, where binding.*

21. A memorandum made by the vendor's broker, with the bought and sold notes copied therefrom, and delivered to, and accepted by, each party, will bind both. *Rucker* v. *Cammeyer*, 1 Esp. 105. Kenyon, C. J. 1794.

S. P. *Hinde* v. *Whitehouse*, 7 East, 559, 69. S. C. 3 Smith, 528, 36. And see *Simon* v. *Metivier*, 1 Bla. 599. S. C. 3 Burr. 1921; *Cooper* v. *Smith*, 15 East, 105, 8; *Blagden* v. *Bradbear*, 12 Ves. 466, 72; *Buckmaster* v. *Harrop*, 13 Ves. 456, 72, 3; 6 Ves. 782; 8 Ves. 250.

22. And semble, that a broker's bought and sold notes bind the parties, without an entry in the broker's book. *Dickenson* v. *Lilwal and others*, 1 Stark. 128. Ellenborough, C. J. 1815.

23. If the agent of the vendor is entrusted by both parties with the drawing up of the terms of the contract, his signature will bind the vendee. *Hicks* v. *Hankin*, 4 Esp. 114. Heath, J. Hertford, 1802.

24. A. is instructed by B. and C. to act as their broker in a treaty for the purchase and sale of sumach. B. afterwards tells A. that he has concluded the bargain, and directs him to prepare the bought and sold notes, which are forwarded to the parties accordingly. C. does not return the note, but in the course of two days expressed his regret at having sold the sumach. A.'s authority continued down to the time of his minuting the agreement. *Chapman* v. *Partridge*, 5 Esp. 256. Mansfield, C. J. 1805.

25. Defendants employed an agent to purchase prize goods, and the auctioneer wrote the agent's initials, with the prices in the printed catalogue, against the lots sold to him. The defendants afterwards wrote to the agent recognizing the purchase. Held, that the entry in the catalogue, coupled with the defendant's letter, constituted a sufficient memorandum within the statute. *Phillimore and others* v. *Barry and another*, 1 Campb. 513. Ellenborough, C. J. 1808.

Acc. *Allen* v. *Bennet*, 3 Taunt, 169. And see *Saunderson* v. *Jackson*, 2 B. & P. 238; *Egerton* v. *Matthews*, 6 East, 307. S. C. 2 Smith, 389; *Champion* v. *Plummer*, 1 N. R. 252.

26. A vendor, writing the contract of sale under the dictation of the vendee, is not an authorized agent for the latter, within the meaning of the statute. *Wright* v. *Dannah*, 2 Campb. 203. Ellenborough, C. J. 1809.

And see *Cooper* v. *Smith*, 15 East, 103.

D. PROMISES ON BEHALF OF THIRD PERSONS.

(And see AGREEMENT, A. (b).)

D. (a) *Original undertaking.*

26. Where the vendor refuses to deliver goods on the credit of the vendee, and a stranger undertakes *absolutely* to pay the amount, the promise need not

be in writing. *Croft* v. *Smallwood*, 1 Esp. 121. Eyre, C. J. 1793.

And see *Matson* v. *Wharam*, 2 T. R. 80; *Anderson* v. *Hayman*, 1 H. Bla. 120; *Legge* v. *Gibson*, Selw. 787, n.; *Sadler* v. *Paine*, Sav. 123. Fitzg. 302.

27. An accommodation acceptor, who defends an action at the request of the drawer, may recover the costs, as money paid to the use of the latter, without an undertaking in writing. *Howes* v. *Martin*, 1 Esp. 162. Kenyon, C. J. 1794.

28. Where a coachmaker who has a lien upon a carriage for repairs, delivers it up to a third person on a promise to pay the charges, it is not within the statute. *Houlditch et alt.* v. *Milne*, 3 Esp. 86. Eldon, C. J. 1800.

29. A. having goods in his possession which are liable to a distress for rent due from B., promises the landlord to pay the rent. No writing is necessary. *Ibid.*

And see *Tomlinson* v. *Gill*, Amb. 330; *Read* v. *Nash*, 1 Wils. 305; *Williams* v. *Leaper*, 3 Burr. 1886. S. C. 2 Wils. 308; *Castling* v. *Aubert*, 2 East, 325; *Barrell* v. *Trussell*, 4 Taunt. 117.

D. (b) *Collateral undertaking.*

(And see post, Merger, pl. 1.)

30. A promise by the indorser of a dishonoured note to indemnify the holder if he will sue the drawer, is within the statute. *Winckworth* v. *Mills*, 2 Esp. 484. Kenyon, C. J. 1796.

Sed vide *Read* v. *Nash*, 1 Wils. 305.

31. A person pretending to be authorized by an election committee, orders a tavern-keeper to entertain voters, and promises verbally, to see him paid. He cannot be sued upon the promise; or for goods sold; but is liable to an action on the case for the misrepresentation. *Thompson* v. *Bond*, 1 Campb. 4. Ellenborough, C. J. 1807.

And see Vendor and Purchaser, C. post.

32. "I guarantee the payment of any goods, which J. S. delivers to J. N." contains a sufficient statement of the consideration, though no cross action would lie for the non-delivery of the goods. *Stapp (or Stedt)* v. *Lill*, 1 Campb. 242. Ellenborough, C. J. 1808.

And the court of K. B. refused a rule for setting aside the verdict. *Ibid.* and 9 East, 348.

33. S. P. admit: *Warrington et alt.* v. *Furber and Warrington*, 6 Esp. 89. Ellenborough, C. J. 1807.

34. But a written proposal to pay a moiety of the debt of another, if the creditor will on the morrow discharge the debtor, was held not to be binding, unless the proposal were accepted in writing. *Gaunt* v. *Hill*, 1 Stark. 10. Ellenborough, C. J. 1815.

E. Will of lands.

35. To prove the execution of a will of lands, it is *primâ facie* sufficient to call *one* of the subscribing witnesses. *Doe d. Stutsbury ux. et alt.* v. *Smith et ux.* 1 Esp. 391. Kenyon, C. J. 1795.

Acc. *Longford* v. *Eyre*, 1 P. Wms. 741. And see *Holdfast* v. *Dowsing*, 2 Stra. 1253. S. C. 1 Bla. 8. Bull. N. P. 264; Gilb. Ev. 69; *Dyrell* v. *Glasscock*, Skinn. 413.

GAME.

A. Penalties.

(a) *Where they attach.*

(b) *How recoverable.*

B. Gamekeeper.

A. Penalties.

A. (a) *Where they attach.*

1. An unqualified person killing game by accident, incurs no penalty. *Molton* v. *Cheesely*, 1 Esp. 123. Buller, J. 1788.

2. *Secus*, if he afterwards carry away the game. *Ibid.*

3. Only one penalty can be recovered under 5 Ann, cap. 14. for one act,

though such act be in contravention of distinct branches of the statute. *Ibid.*

Acc. *Rex* v. *Lovett*, T. R. 152. And see an observation on the principal case, Selw. 840, and 10 East, 21 n.

See also *Marriott* v. *Shaw*, 1 Comyns's Rep. 274; *Regina* v. *Matthews*, 10 Mod. 26; *Crepps* v. *Durden*, Cowp. 640; *Brooke* v. *Milliken*, 3 T. R. 509; *Rex* v. *Bleasdale*, 4 T. R. 809; *Rex* v. *Swallow*, 8 T. R. 284; post, PENAL ACTION, A. (g); MSS. D. 70.

4. The penalty of 50*l.* under 25 Geo. 3. cap. 10 and 15, did not attach upon a mere refusal to produce the certificate. The party must also have refused to give his name and residence. *Molton* v. *Rogers*, 4 Esp. 215. Ellenborough, C. J. 1802.

And see 52 Geo. 3. cap. 93; Sched. L. rule 11, 12, 13, 16.

5. An unqualified person may join one who is qualified, provided he be not himself a principal using his own dogs. *Ibid.*

S. P. *Lewis* v. *Taylor*, 16 East, 49.

6. And where the unqualified person comes into the field with his own dogs, the penalty does not attach, if the dogs were brought there on a loan to the qualified sportsman. *Ibid.*

7. But the defendant must give satisfactory proof of the qualification of the person he joins. *Clarke* v. *Broughton*, 3 Campb. 328. Ellenborough, C. J. 1813.

N. But stat. 52 Geo. 3. cap. 93. sched. L. requires *certificates* to be taken out by all persons *assisting*, in any manner, in the taking or killing of game, &c.

A. (b) *How recoverable.*

8. Whilst the law gave part of the penalty for killing game to the poor of the parish, the name of the parish was matter of substance; but the whole penalty being given to the informer, by 2 Geo. 3. cap. 19. s. 5. the parish stated in the declaration is now considered merely as a venue; and the offence may be shewn to have been committed in any other parish within the county. *Clark* v. *Taylor*, 3 Esp. 219. Kenyon, C. J. Hertford, 1800.

B. GAMEKEEPER.

9. Under 3 Geo. 1. cap. 11. s. 1. it was not necessary that a deputation to an unqualified gamekeeper, not being a servant to the lord, should express that he was *appointed to take and kill the game for the sole use of the lord*. *Spurrier* v. *Vale*, 1 Campb. 457. Macdonald, C. B. Chelmsford, 1808, and K. B. 1808.

10. And the presumption of law would be that he was appointed for that purpose until the contrary appeared. *Ibid.*

11. Under this act corporations were not excluded from appointing unqualified persons to be gamekeepers. *Ibid.*

N. These questions are set at rest by 48 Geo. 3. cap. 93. sect. 2.

GAMING.

A. GAMING CONTRACT, WHEN VALID.
- (a) *Action, when maintainable on original contract.*
- (b) *On a collateral contract.*

B. GAMING CONTRACT, WHEN VOID.
- (a) *At common law.*
- (b) *By statute.*

C. CONTRACT, HOW AVOIDED.
- (a) *By action.*
- (b) *By plea.*

A. GAMING CONTRACT, WHEN VALID.

A. (a) *Action, when maintainable on the original contract.*

1. Where A. bets 100*l.* that he will trot two horses 16 miles in two hours, he may divide the labour between the two horses in any manner he thinks proper. *Robson* v. *Hall*, Peake, 127. Kenyon, C. J. 1792.

N. No observation seems to have been made on the illegality of the wager;

though it appears to have been objectionable, as well in respect of the amount, as of the subject matter. See *Blaxton* v. *Pye*, 2 Wils. 309; *Clayton* v. *Jennings*, 2 Bla. 706; *Ximenes* v. *Jaques*, 6 T. R. 499; *Whaley* v. *Pajot*, 2 Bos. & Pul. 51.

2. Money fairly won at all fours may be recovered where the sums won and lost in the course of the sitting, at no time exceed 10*l*. *Bulling* v. *Frost*, 1 Esp. 235. Kenyon, C. J. 1794.

N. This is stated to have been considered as an action of the first impression; but see *Eggleton* v. *Lewin*, 3 Lev. 118; *Sherbon* v. *Colbach*, 2 Vent. 175; *Whitgrave* v. *Chancey*, 1 Lutw. 180, in which it was decided, that a *general indebitatus* would not lie.

3. So an action will lie upon a wager of four guineas against six, upon a *bonâ fide* horse race; such race being for 50*l*. or upwards. *M'Allester* v. *Haden*, 2 Campb. 438. Lawrence, J. Stafford. 1810.

Acc. *dictum per* Lord Kenyon, 3 T. R. 706.

And see *Blaxton* v. *Pye*, 2 Wils. 309; *Johnson* v. *Bann*, 4 T. R. 1; *Whaley* v. *Pajot*, 2 Bos. & Pul. 51.

4. An action may be maintained on a wager of *a rump and dozen*, on the ages of the parties. *Hussey* v. *Crickett*, 3 Campb. 168. Mansfield, C. J. 1811, and C. P. E. 1812.

5. And if a dinner be ordered by a person authorized by the respective parties, and the winner pay the amount of the tavern bill, it is money paid to the use of the loser. *Ibid.*

6. Horses to run for sweepstakes to be entered before 31st March; all disputes to be decided by the stewards; who pronounce in favour of a horse entered 1st April. In an action against the clerk of the course, by the owner of a horse entered in time, the court will not open the award of the stewards, unless fraud or partiality can be shewn. *Milburne* v. *Oliver*. Ellenborough, C. J. Guildhall, December, 1810. MSS.

7. A party laying a wager on the identity of a third person, cannot set it aside on the ground that the opposite party had received *certain* information that he was mistaken. *Bland* v. *Collett*, 4 Campb. 157. Gibbs, C. J. 1815.

8. And it is too late for him, on discovering his mistake, to countermand the authority of the stake-holder to pay over the money betted. *Ibid.*

A. (b) *Upon a collateral contract.*

9 Money lent, upon a *parol* contract for the purpose of gaming, is recoverable in assumpsit. *Wettenhall* v. *Wood*, 1 Esp. 18. Kenyon, C. J. 1793.

S. P. *Barjeau* v. *Walmsley*, 2 Stra. 1249; *Robinson* v. *Bland*, 1 Bla. 234, 47, 60, 1, 2. S. C. 2 Burr. 1077, 80.

Acc. *Alcinbrook* v. *Hall*, 2 Wils. 309; *Vaughan* v. *Whitcomb*, 2 N. R. 413.

10. A. having laid a wager with B., admits C. to a share; A. wins and pays C. his proportion; but before any thing is paid by B. he destroys himself. A. may recover back the payment from C. *Simpson* v. *Bliss*, Holt, 273. Gibbs, C. J. 1816.

B. Gaming contract, when void.

B. (a) *At common law.*

12. A wager upon the contingency of a peace between this country and a state with which it is at war, is illegal. *Lacaussade* v. *White*, 2 Esp. 629. Kenyon, C. J. 1798.

S. C. 7 T. R. 535. S. P. *Foster* v. *Thackery*, 1 T. R. 57 n; *Aubert* v. *Walsh*, 3 Taunt. 267,

And see *Gilbert* v. *Sykes*, 16 East, 150.

Sed vide *Dupays* v. *Shepherd*, 12 Mod. 216.

13. The judge at nisi prius will stop the trial of a cause where, upon the opening of the pleadings, it appears that the point in issue is a wager on a question of law, in which the parties have no interest. *Henkin* v. *Gerss*, 2 Campb. 409. Ellenborough, C. J. and K. B. E. 1810.

S. C. 12 East, 248. And see *Brown* v. *Leeson*, 2 H. Bl. 43; *Grantham* v. *Hawley*, Hob. 132; *Good* v. *Elliott*, 3 T. R. 693; Anon, Bunb. 17; *Micklefield* v. *Hepgin*, 1 Anst. 133.

14. An action cannot be maintained on a wager which involves ludicrous inquiries, tending to the degradation of courts of justice. *Squires* v. *Whisken*, 3 Campb. 140. Ellenborough C. J. 1811.

15. Or upon a wager whether an un-

married woman will be delivered of a child. *Ditchburn* v. *Goldsmith*, 4 Campb. 152. Gibbs, C. J. 1815.

B. (b) *By statute.*

16. A cock-fight, and consequently a wager on the event, are illegal. No action will lie therefore to recover the amount of such wager. *Squires* v. *Whisken*, 3 Campb. 140. Ellenborough, C. J. 1811.

Acc. 4 Com. Dig. Justices of the Peace, B. 42. And see 11 Co. 89 b.

C. CONTRACT, HOW AVOIDED.

C. (a) *By action.*

17. Held, that money paid by one party to an illegal wager to the other, might be recovered after the event has been decided against the plaintiff. *Lacaussade* v. *White*, 2 Esp. 629. Kenyon, C. J. 1798.

And the court of K. B. refused a rule to set aside verdict. *Ibid.* and 7 T. R. 535.

Sed vide *Howson* v. *Hancock*, 8 T. R. 575; *Vandyck* v. *Hewitt*, 1 East, 96, 8; *Lubbock* v. *Potts*, 3 Smith, 401; *Oom* v. *Bruce*, 12 East, 225, 6; *Clayton* v. *Dilly*, 4 Taunt. 165. Ante, ASSUMPSIT, pl. 84. Post, INSURANCE, pl. 74.

C. (b) *By plea.*

18. Where the defendant pleads, in avoidance of a bond, that it was given to secure money won at *a certain game, called faro*, the particular game is part of the issue, and must be proved. *Mazzinghi* v. *Stephenson*, 1 Campb. 291. Mansfield, C. J. 1808.

And see *Calborne* v. *Stockdale*, 1 Stra. 495.

GAOLER.

A. LIABILITY, FOR EXTORTION.

(a) *Civil.*

1. Money had and received will lie against a gaoler who takes from a prisoner a larger sum for a bed than is allowed by the printed regulations of the magistrates, though such overcharge may have been sanctioned by custom, the accounts passed by the justices, and the amount paid over to the use of the county. *Miller* v. *Aris*, 3 Esp. 231. Kenyon, C. J. 1800.

S. C. Selw. 88 n.

IMPRISONMENT.

(And see ante, ACTION, pl. 12; ACTION ON THE CASE, A. (g); post, OFFICER, B.; TRESPASS, A.)

A. WHAT AMOUNTS TO AN IMPRISONMENT.

B. WHEN JUSTIFIABLE.

A. WHAT AMOUNTS TO AN IMPRISONMENT.

1. A warrant of commitment against a party previously in custody is not an imprisonment, except where, in consequence of such warrant, he is confined to narrower bounds. *Crowley* v. *Impey and others*, 2 Stark. 261. Ellenborough, C. J. 1817.

2. The giving of a party in charge to a constable, who does not take possession of his person, will not support an action. *Simpson* v. *Hill*, 1 Esp. 431. Eyre, C. J. 1795.

3. If, while B. is in the act of unlawfully putting A. in irons, C. commit an assault upon the latter, he is guilty of the false imprisonment jointly with B. *Boyce* v. *Douglas*, 1 Campb. 60. Ellenborough, C. J. 1807.

B. WHEN JUSTIFIABLE.

(And see ante, FELONY, pl. 21.)

4. A. being in the custody of a watchman, B. encourages him to resist. This will justify the imprisonment of B. *White* v. *Edmunds and others*, Peake, 89. Kenyon, C. J. 1791.

5. A sheriff is not bound to set at liberty a party arrested, unless he receive a written discharge from the plaintiff. *Taylor* v. *Brander and Tebbs*,

sheriffs of London, 1 Esp. 45. Kenyon, C. J. 1792.

And see *Withers* v. *Henley*, 1 Roll. Rep. 241, 2; *Walden* v. *Vesey*, Latch. 17, 19. Sed vide 2 Inst. 382.

6. After receiving such discharge, he may detain the party a reasonable time, to search the office for other writs against him. *Ibid.*

And see *Withers* v. *Henley*, Cro. Jac. S. C. 1 Roll. Rep. 240.

7. And 24 or 26 hours will not be considered an unreasonable delay. *Ibid.*

8. The officer is not bound to make the search until the written discharge arrives. *Ibid.*

Stringar v. *Stanlack*, Cro. El. 404.

9. Talking loudly in the street is not an offence which will justify a watchman in taking the party into custody. *Hardy* v. *Murphy and Wedge*, 1 Esp. 294. Eyre, C. J. 1795.

10. And the watchman, and a constable who adopts his acts, may be sued jointly for the imprisonment. *Ibid.*

11. Semble, that the captain of an Indiaman may imprison a passenger who refuses to take the station assigned to him on the approach of an enemy. *Boyce* v. *Bayliffe*, 1 Campb. 60. Ellenborough, C. J. 1807.

Acc. dict. per Heath, J. 3 B. & P. 616.

INFANT.

(And see Manning's Exch. Pra. 139, 500.)

A. Where bound by act during nonage.

B. Where liable to action.

(a) *For money embezzled.*

(b) *For necessaries.*

(c) *On other contracts.*

(d) *Upon new promise.*

C. Plea of infancy.

(a) *How supported.*

(a) *Where waved.*

D. Guardian on record.

(a) *How far liable for costs.*

A. Where bound by act during nonage.

1. The attorney for the plaintiff in ejectment, brought on the demise of an infant, makes a *bond fide* compromise with the tenant, who thereupon attorns to the infant. The latter at full age cannot bring a new ejectment without notice. *Doe* d. *Miller* v. *Noden*, 2 Esp. 530. Kenyon, C. J. 1797.

2. Though he should have done no act to ratify the compromise. *Ibid.*

B. Where liable to action.

B. (a) *For money embezzled.*

3. Semble, that assumpsit lies against an infant for money embezzled by him. *Bristow and others, assignees, &c.* v. *Eastman*, Peake, 223, and 1 Esp. 172. Kenyon, C. J. 1794.

B. (b) *For necessaries.*

4. Infant is not liable for money lent, though laid out in the purchase of necessaries. *Probart* v. *Knouth*, 2 Esp. 472, n. Buller, J. 1783.

5. Or upon a bill of exchange, accepted for necessaries. *Williamson* v. *Watts, spinster*, 1 Campb. 553. Mansfield, C. J. 1808.

Sed vide *Williams* v. *Harrison and another*, Carth. 160; *Trueman* v. *Hurst*, 1 T. R. 40. See also *Fisher* v. *Mowbray*, 8 East, 330.

6. But the infancy of the drawer does not affect the rights of third persons *inter se*. *Taylor* v. *Croker*, 4 Esp. 187. Ellenborough, C. J. 1803.

Acc. *Haly* v. *Lane*, 2 Atk. 182. Vide tamen, *Jeune* v. *Ward*, 3 Stark. 330.

6. It furnishes no defence for the acceptor in an action brought by an indorsee, even where the infant drawer has shewn his wish to avoid his own contract by requesting the plaintiff to deliver up the bill. *Ibid.*

8. In an action for money paid in Scotland to prevent the defendant, an infant, from being arrested there, it lies upon him to prove that by the laws of

that country his infancy would have been a defence against the *present* demand. *Male* v. *Roberts*, 3 Esp. 163. Eldon, C. J. 1800.

And see *Mure* v. *Kaye*, 4 Taunt. 34.

9. Money advanced to release an infant taken in *execution*, may be recovered as necessaries. *Clark* v. *Leslie*, 5 Esp. 28. Alvanley, C. J. 1803.

And see *Finley* v. *Jowle*, 13 East, 6.

10. But if the infant was in custody upon *mesne process*, it must be shewn that the debt upon which she was arrested was for necessaries. *Ibid.*

11. In neither case, however, can the lender recover, if his object in advancing the money was to enable her to live in a state of prostitution. *Ibid.*

12. Regimentals sold to a member of a volunteer corps are necessaries. *Coates* v. *Wilson*, 5 Esp. 152. Ellenborough, C. J. 1804.

13. But not a chronometer sold to a lieutenant in the navy out of commission. *Berolles* v. *Ramsay*, Holt. 77. Gibbs, C. J. 1815.

14. The question of necessaries is to be governed by the real circumstances of the infant, not by his ostensible situation. *Ford* v. *Fothergill*, Peake, 229, and 1 Esp. 211. Kenyon, C. J. 1794.

B. (c) *On other contracts.*

15. An infant who is a master workman, is not liable for work done for him by an under-workman in the way of his trade. *Dilk* v. *Keighley*, 2 Esp. 480. Kenyon, C. J. 1796.

And see *Whittingham* v. *Hill*, Cro. Jac. 494; *Whywall* v. *Champion*, 2 Stra. 1083, acc. Cont. Bull. N. P. 154. 12 Vin. Abr. Evidence, (T. b. 4.)

16. Infancy is an answer to a warranty of the soundness of a horse. *Howlett* v. *Haswell*, 4 Campb. 118. Gibbs, C. J. 1815.

B. (d) *Upon new promise.*

17. Where the defendant, after full age, promises to pay "*when he is able*," the plaintiff must prove ability. *Cole, executor of Cole*, v. *Saxby*, 3 Esp. 159. Eldon, C. J. 1800.

18. But here ostensible circumstances are sufficient. *Ibid.*

19. An express promise after the party becomes of age, should be voluntary; it is not binding, if made under the terror of an arrest. *Harmer* v. *Killing*, 5 Esp. 102. Alvanley, C. J. 1804.

S. P. Contra. *Withepole's* case, cited, Palm. 522.

20. And semble, that the party should be apprized of the option allowed him by law, to rescind or confirm his contracts. *Ibid.*

Cont. Palmer, 522. And see *Stevens*, v. *Lynch*, 12 East, 38. Ante, Bills and Notes, pl. 241.

B. Plea of infancy.

C. (a) *How supported.*

21. To prove infancy, it is sufficient to produce an examined copy of the parish register, and identify the parties by calling persons who know that he was born about the period expressed in the register. *Leader* v. *Barry*, 1 Esp. 353. Kenyon, C. J. 1795.

As to the latter point, see *Birt* v. *Barlow*, Dougl. 162, 170.

22. Where goods are delivered to a carrier for an infant vendee, he is not bound, though when the goods reached him he is of age. *Griffin* v. *Langfield and wife*, 3 Campb. 254. Ellenborough, C. J. 1812.

23. But a person is bound by his acceptance given when of full age, though he were a minor when the bill was *drawn*. *Stevens* v. *Jackson and another*, 4 Campb. 164. Gibbs, C. J. 1815.

C. (b) *Where waved.*

24. Payment of money into court, with a plea of infancy, is not an admission of the plaintiff's right of action, ultra the sum paid in. *Hitchcock* v. *Tyson*, 2 Esp. 482, n. Buller, J. 1796.

D. Guardian on record.

(And see ante, Evidence, H. (i).)

D. (a) *How far liable.*

25. A person suffering his name to appear as guardian on the record, is liable for costs to the infant's attorney,

as well as to the opposite party. *Marnell, gent.* v. *Pickmore,* 2 Esp. 473. Kenyon, C. J. 1796.

INFERIOR COURTS.

(And see Mann. Exch. Pra. 399, 423. *Evans* v. *Munkley,* 4 Taunt. 48; *Lees* v. *Rogers, ib.* 150.)

A. Courts of Requests.

1. Semble, that an action will lie in K. B. upon a judgment recovered in the London court of requests. *Coore* v. *Keneday,* 3 Esp. 280. Kenyon, C. J. 1801.

Sed vide *Foott* v. *Coare,* 2 Bos & Pull. 588. Tidd. 986.

2. In such action the plaintiff must prove, that the defendant was, *at the time of the judgment,* resident within the jurisdiction. *Ibid.*

3. After the payment of money into court, a defendant cannot set up the London Court of Conscience Act to deprive the plaintiff of costs. *Miller* v. *Williams,* 5 Esp. 19. Ellenborough, C. J. 1803.

4. To subject a plaintiff to costs under this act, it is not sufficient to shew that he has underwritten policies at Lloyd's, without proving that he is an underwriter by trade. *Ibid.*

And see *Gould* v. *Colyer, gent.* 1 Smith, 334; *Jefferies* v. *Watts,* 1 N. R. 153; *Gray* v. *Cook,* 8 East, 336.

INFORMER.

1. If A. upon the suggestion of B., make a seizure of naval stores, and communicate the intelligence to the admiralty, B. is the party entitled to a moiety of the penalty, under 17 Geo. II. cap. 40. s. 10. *Rex* v. *Banks,* 1 Esp. 144. Kenyon, C. J. 1794.

INNKEEPER.

(And see ante, Carrier, pl. 13, note.)

A. Liability to guests.

B. Liability for guests.

A. Liability to guests.

1. A guest, taking exclusive charge himself, keeping the key, and turning the room into a shop, may, discharge the innkeeper from his common law liability. *Farnworth and another, assignees,* v. *Packwood,* 1 Stark. 249. Holt, 209. Le Blanc, J. Lancaster, 1816.

2. But if the exclusive possession of the guest cease, the liability of the landlord revives. *Ibid.*

3. An innkeeper is not responsible for a loss from a room occupied exclusively by the guest for the purpose of exhibiting goods for sale. *Burgess* v. *Clements,* 1 Stark. 251, n. Richards, B. Oxford, 1815.

4. Or if the loss be occasioned by the negligence of the guest. *Ibid.*

And the court of K. B. discharged a rule for a new trial. *Ibid.* Holt, 211, n.

B. Liability for guests.

5. An action against the keeper of an hotel for washing done for his guests, was held not maintainable, without proof of his being in the habit of paying bills left unpaid by the guests. *Callard* v. *White,* 1 Stark. 171. Ellenborough, C. J. 1815.

INQUIRY AND INQUISITION.

1. After judgment for the plaintiff on demurrer to the replication, a lease mentioned in the condition of a bond set out by the defendant upon oyer, need not be proved. *Collins* v. *Rybot,* 1 Esp. 157. Kenyon, C. J. 1794.

And see *Thellusson* v. *Fletcher,* Dougl. 301, 315, *Green* v. *Hearne,* 3 T. R. 301; *De Gaillon* v. *L'Aigle,* 1 Bos. and Pull. 368. 2 Saund. 107, n. 2.

2. But it is not sufficient, after demurrer to declaration in the usual form, to put in a bond having a condition similar to that mentioned in the suggestion, without identifying the bond produced with that upon which judgment. *Hodgkinson* v. *Marsden,* 2 Campb. 121. Ellenborough, C. J. 1809.

See ante, Covenant, pl. 18, where a still greater degree of evidence appears to have been required.

3. Upon a suggestion of breaches after judgment by default, the plaintiff must prove the condition of the bond, and

the award, indenture, or articles, as well as the breaches. [illegible], 1 Wms. Saunders, 58. [illegible], J. Hereford, 1803.

N. On executing a writ of inquiry, where some of the counts are bad, the plaintiff may give evidence, and take a verdict, upon the good counts only. *Symonds* v. *Parminter*, 1 Wils. 180. And if he incautiously take a general verdict, he may in K. B. set aside his own proceedings before final judgment. *Mitchell* v. *Milbank*, 6 T. R. 199. And see Gilb. C. P. 130, 1.

INSOLVENTS.

A. Operation of insolvent acts.

(a) *Protection of insolvents.*

(b) *Disabilities of insolvents.*

B. Composition with creditors.

C. Deceased insolvents.

A. Operation of insolvent acts.

(a) *Protection of insolvents.*

1. Where a statute discharges the person of an insolvent from debts contracted before a certain day, the party is not personally liable upon a note given to a creditor *after* the day to secure a *prior* debt. *Lucas* v. *Winton*, 2 Camph. 443. Ellenborough, C. J. 1810.

Sed vide *Marks* v. *Upton*, 7 T. R. 305.

2. But with respect to an indorsee for value, it is a new debt, and may be recovered accordingly. *Ibid.*

Acc. *Macdonald* v. *Bovington*, 4 T. R. 825.

Sed vide *Sharpe* v. *Iffgrave*, 3 Bos. and Pull. 394.

A. (b) *Disabilities of insolvents.*

3. Until assignees are chosen, the property which belonged to the insolvent is vested in the clerk of the peace, and cannot be taken in execution, although it remain in the possession of the insolvent. *Hindle* v. *Bell and another*, Holt, 161. Gibbs, C. J. 1816.

4. If at the time of his discharge, the insolvent were proprietor of goods which he had pawned, the property vests in the clerk of the peace, subject to the interest of the pawnee. And if the insolvent, after his discharge, redeem the property, it may be taken in execution for the newly acquired possessory interest. *Ibid.*

5. To defeat an action by shewing, that after the cause of action had accrued, the plaintiff was discharged under an insolvent debtor's act, it is necessary to call the clerk of the peace, and to give in evidence the order of quarter sessions; an *acknowledgment* by the plaintiff is not sufficient. *Scott* v. *Clare*, 3 Campb. 236. Ellenborough, C. J. 1812.

And see *Gillam* v. *Stirrup*, Cas. temp. Hardw. 145; *Savage* v. *Field*, *ibid.* 186; *Winstanley* v. *Head*, 4 Taunt. 192.

6. And it appears to have been considered on a former occasion, that the fact, if established, would have been no defence. *Hart* v. *Sarah Newman*, 3 Campb. 13. Ellenborough, C. J. 1811.

N. But in this case the attention of the court does not appear to have been drawn to the usual clause in insolvent acts, which vests all the property of the insolvent in the clerk of the peace, without reference to the contents of the schedule.

And see *Doe* v. *Telling*, 2 East, 257; *Brown* v. *Rivers*, Dougl. 472. 51 Geo. III. cap. 125. sect. 17. 52 Geo. III. cap. 165. sect. 10.

B. Composition with creditors.

7. A creditor who signs a deed of composition, leaving the amount of his debt in blank, binds himself to the extent of all existing debts though the deed refers to sums set opposite to the name of the executing parties. *Harrhy* v. *Wall*, 2 Stark. 195. Ellenborough, C. J. 1817.

And a rule to set aside nonsuit refused. 1 B. & A. 103.

And see *Holmer* v. *Viner*, 1 Esp. 132.

8. A party who has distinct demands against an insolvent, cannot prove 11

demand under a composition, and, at a subsequent period, resort to a surety for the remainder. *Holmer* v. *Viner*, 1 Esp. 132. Kenyon, C. J. 1794.

Acc. *Stock* v. *Mawson*, 1 Bos. and Pull. 286. *Ex parte Parquet*, 14 Ves. 493. *Mackenzie* v. *Mackenzie*, 16 Ves. 372.

And see *ex parte D'Oliveira*, 8 Ves. 84.

9. Under a deed of composition a creditor may prove a bill which is not due, allowing a rebate of interest. *Ibid.*

10. And a party to the deed neglecting to prove such demand, is precluded from afterwards suing a collateral surety. *Ibid.*

11. The plaintiff with other creditors of the defendant, agrees to accept a composition. The draft of a deed, whereby the defendant assigns all his property to trustees, in pursuance of this agreement, is approved by the plaintiff's attorney, and the deed is executed by the defendant on the faith of the plaintiff's acquiescence. The plaintiff cannot recede from his engagement, and by refusing to execute the deed, resort to his original demand. *Butler* v. *Rhodes*, 1 Esp. 236, and Peake, 238. Kenyon, C. J. 1794.

And see *Anstey* v. *Marden*, 1 N. R. 124. S. C. 2 Smith, 426.

12. It was covenanted that the insolvent should give bills, accepted by the defendant, for 10*s*. in the pound, and his own notes for 5*s*. The plaintiff, who signed the deed, obtained the defendant's acceptances for the whole 15*s*., retaining the debtor's liability for the 5*s*. Held, that though the transaction was void as to the last 5*s*. the plaintiff might recover the 15*s*. *Feize* v. *Randall*, 1 Esp. 224. Kenyon, C. J. 1794.

And the court of K. B. refused a rule to set aside verdict. 6 T. R. 146.

N. In the case as reported 6 T. R. 146, there appears to have been no reservation of the remaining 5*s*.; and the opinion of the court was grounded on the plaintiff's obtaining no *larger* dividend than the other creditors. But the transaction would now be considered fraudulent in either point of view. *Leicester* v. *Rose*, 4 East, 372, 84. S. C. 1 Smith, 41.

And see *Cecil* v. *Plaistow*, 1 Anst. 202; *Fawcett* v. *Gee*, 3 Anst. 910; *Fitch* v. *Sutton*, 5 East, 230. S. C. 1 Smith, 415. *Steinman* v. *Magnus*, 11 East, 393; *Walker* v. *Seaborne*, 1 Taunt. 526.

13. Where there is a clause for making the composition void, unless *all* the creditors execute, it is not invalidated by the non-execution of a creditor, *who accepts an instalment*. *Jolly et alt. assignees of Norton*, v. *Wallis*, 3 Esp. 228. Kenyon, C. J. 1800.

But see Vendor and Purchaser, F. post.

14. The execution of an instrument containing a proviso, that in default of payment of the instalments, the creditors may take possession of all the insolvent's goods, is not an act of bankruptcy. *Ibid.*

15. Plaintiffs and other creditors of defendant, entered into an agreement with him to accept 20 per cent. in satisfaction of their debts, one half to be paid by defendant within a month, and the other *by the acceptances of a third person.* Ruled, that the plaintiff after receiving the composition, might sue for the residue of the original debt. *Steinman* v. *Magnus* 2 Campb. 124. Ellenborough, C. J. 1808.

But the verdict for the plaintiff was set aside in K. B. the L. C. J. concurring. *Ibid.* and 11 East, 390.

16. And where plaintiffs signed an agreement to take the defendant's notes for the payment of the amount of their respective demands by instalments, *provided the rest of the creditors would do the same*, it was held, that the signing of the other creditors was a sufficient consideration for the plaintiff's promise; and that the latter could not resort to the original cause of action, without shewing a breach of the agreement on the part of the defendant. *Boothbey and others* v. *Sowden*, 3 Campb. 175. Ellenborough, C. J. 1812.

And see *Cranley* v. *Hillary*, 2 M. & S. 121.

17. Where creditors agree to take a composition to be secured partly by the acceptances of a third person and partly by the notes of the debtor, and to execute a deed containing a clause of release, the debtor cannot be sued by a creditor who has promised to come in under the agreement, but refuses to execute the deed notwithstanding the notes and acceptances have been tendered, and the deed has been executed

by all the other creditors. *Bradley* v. *Gregory*, 2 Campb. 383. Ellenborough, C. J. 1810.

18. A creditor who, after executing a composition deed, discovers that the debtor has committed an act of bankruptcy, may sue out a commission of bankrupt. *Doe* d. *Pitcher*, v. *Anderson and another*, 1 Stark. 262. Ellenborough, C. J. 1816.

C. Deceased insolvents.

19. Where all the creditors of a person who dies insolvent, agreed to a rateable distribution of his effects, for which purpose the assets were to be assigned to trustees, it was held, that one creditor who refused to execute the deed of assignment, could not sue the administratrix on his original demand. *Brady* v. *Sheil, administratrix, &c.* 1 Camph. 147. Mansfield, C. J. 1807.

20. The creditors of a deceased insolvent may be compelled in equity to accept a rateable distribution. *Ibid.*

And see *Meux* v. *Howell*, 4 East, 7, 9, 10. *Tolputt* v. *Wells*, 1 M. & S. 395.

INSURANCE.

(And see ante. Covenant, pl. 1, 5, 6.)

A. Parties to the contract.

(a) *Who may be insured.*
(b) *Who may be insurers.*

B. Subject matter.

(a) *How described.*
(b) *Prohibited goods.*
(c) *Commerce with the enemy.*
(d) *Illegal voyage.*
(e) *Property of master and mariners.*

C. Interest of the insured.

(a) *Expected profits.*
(b) *Prize.*
(c) *Trust property.*
(d) *Double insurance.*
(e) *Interest, how described.*
(f) *How proved.*

D. Ship.

(a) *Seaworthiness.*
(b) *Neutrality.*

E. Risk.

(a) *Risks insured against by the common policy.*
(b) *Risks excluded by the common memorandums.*
(c) *Duration of risk.*
(d) *Short interest.*

F. Policy.

(a) *Stamp.*
(b) *Alteration.*
(c) *Valued policy.*
(d) *Description of the object insured.*
(e) *Construction of usual memorandum.*

G. Warranties.

(a) *What shall amount to a warranty.*
(b) *How construed.*
(c) *Neutrality.*
(d) *Time of sailing.*
(e) *Sailing with convoy.*

H. Representations.

(a) *When material.*
(b) *How made.*
(c) *How construed.*

I. Concealment.

(a) *When material.*

K. Misconduct.

(a) *Delay.*
(b) *Deviation.*
(c) *Negligence.*
(d) *Carrying simulated papers.*

(e) *Irregular clearance.*
(f) *Breach of convoy act.*

L. Loss.

(a) *By perils of the seas.*
(b) *By fire.*
(c) *By capture.*
(d) *By detention.*
(e) *By barratry.*
(f) *General average.*
(g) *Particular average.*
(h) *Stranding.*

M. Abandonment.

(a) *Where allowed.*
(b) *At what time.*
(c) *In what form.*

N. Adjustment.

(a) *How made.*
(b) *Effect of.*

O. Action.

(a) *Notice of loss.*
(b) *Limitation of action.*

P. Evidence.

(a) *Mode of proof.*
(b) *Competency of witnesses.*

Q. Insurance broker.

(a) *His rights.*
(b) *Duty and liability.*

R. Fire insurance.

A. Parties to the Contract.

A. (a) *Who may be insured.*

And see post, Partner, A. (c.)

1. Under the general issue the defendant cannot give evidence that the parties interested are become alien enemies. *Harman and others* v. *Kingston*, 3 Campb. 153. Ellenborough, C. J. 1811.

And the court of K. B. discharged a rule for a new trial. *Ibid.*

2. And had the fact been pleaded, it would not have been established by proving that the parties, at the time the insurance was effected, were resident in a place which has *since* been annexed to the enemy's territories. *Ibid.*

And see Alien, 3, 4, 5, post, B. (b) F. (d). G. (c). P. (a). Dougl. 732.

A. (b) *Who may be insurers.*

3. If merchants raise a joint fund, and underwrite each other's property severally, the insurance is legal, though losses be paid out of the joint fund. *Harrison* v. *Millar*, 2 Esp. 513. Kenyon, C. J. 1796. See 1 Taunt. 6.

4. A policy by a club of mutual underwriters, where the members are not responsible for the solvency of each other, is valid, although the sums which each member engages, depending on the amount for which he is insured, cannot be specified on the policy. *Dowell* v. *Moon*, 4 Campb. 166. Gibbs, C. J. 1815. See *Reed* v. *Cole*, 3 Burr. 1512.

B. Subject-matter.

B. (a) *How described.*

5. An insurance of *goods and merchandize*, will cover *dollars*, if entered at the custom-house. *Thomas* v. *Royal Exchange Assurance Company*. Dampier, J. Cornwall Summer Assizes, 1815.

6. But not *bank notes*. *Ibid.*

S. C. not S. P. 1 Price, 195. And see ante, Assumpsit, pl. 78. *Barbe* v. *Parker*, 1 H. B. 283.

B. (b) *Prohibited goods.*

7. A policy on goods is entirely vitiated if any part consist of naval stores, exported without a licence. *Parkin* v. *Dick*, 2 Campb. 221. Ellenborough, C. J. 1809.

Acc. *Wilson* v. *Marryatt*, 8 T. R. 46. *Bird* v. *Pigou*, Selw. 929. Agreement, 39.

B. (c) *Commerce with the enemy.*

8. Goods purchased in an enemy's country, by a subject residing here, may be insured. *Bell* v. *Potts*, 2 Esp. 612. Buller, J. 1798.

And see *Fayle* v. *Bourdillon*, 3 Taunt. 546. Ante, BILLS, pl. 69. The Ann, Smith, Dodson, 223.

9. A voyage to Copenhagen commenced after the period at which that place, according to the capitulation published in the Gazette, was to be restored to the enemy, but before any certain intelligence had arrived of the actual evacuation, is legal, where it appears that the object of the adventure was not a trading with the enemy. *Atkinson* v. *Abbott*, 1 Campb. 535. Ellenborough, C. J. 1808.

And the court discharged a rule for a new trial. *Ibid.* and 11 East, 135.

10. An insurance on goods to be delivered in a neutral port on account of a neutral resident in another neutral port in the occupation of the enemy, is valid. *Bromley* v. *Hesseltine*, 1 Campb. 75. Ellenborough, C. J. 1807.

11. Or if he be resident in the enemy's country. *Ibid.*

And see *Morgan* v. *Oswald*, 3 Taunt. 554.

12. Semble, that it would be otherwise where the goods are to be delivered at the port occupied by the enemy. *Ibid.*

13. A voyage to a country in which British commerce is interdicted, and with which there is no diplomatic intercourse, is legal, if no positive acts or declarations of hostility have taken place. *Muller* v. *Thompson*, 2 Campb. 610. Ellenborough, C. J. 1811.

14. A policy allowing the vessel to trade to any ports in a particular district, within which there are some hostile ports, is good, unless it appear that it was in contemplation to proceed to a hostile port. *Ibid.*

Recognized in *Gall* v. *Dunlop*, 7 Taunt. 204. 2 Marsh. 453. See ante, EVIDENCE, K.

15. A voyage begun before the day on which the licence expires, continues to be protected, although the vessel be prevented by stress of weather, from completing the voyage within the time. *Groning* v. *Crockett*, 3 Campb. 83. Ellenborough, C. J. 1811.

16. And where the insurance is *at and from* the port, and the vessel is ready to sail within the time, the underwriters are not discharged by her being detained in port by contrary winds. *Schroder* v. *Vaux*, 3 Campb. 84, n. Ellenborough, C. J. 1811.

And the court of K. B. refused a rule for a new trial. *Ibid.* and 15 East, 53.

See *Siffken* v. *Allnutt*, 1 M. & S. 39.

17. A prospective licence granted after a voyage from an enemy's country has commenced is inoperative. *Henry (or Henty)* v. *Staniforth*, 4 Campb. 470. 1 Stark. 254. Ellenborough, C. J. 1815.

18. But if the parties contemplated the obtaining of a regular licence, the premium may be recovered back. *Ibid.*

And the court discharged a rule for a new trial. *Ibid.*

19. Where an enemy's colony is recognized incidentally by a British act of state, as no longer *under the dominion* of the enemy, a subject may trade to that colony, without a licence. *Blackburn and another* v. *Thompson*, 3 Campb. 61. Ellenborough, C. J. 1811.

And the court discharged a rule for a new trial. *Ibid.* and 15 East, 86.

And see *Johnson* v. *Greaves*, 2 Taunt. 344, 55.

20. A licence to sail to an enemy's country, notwithstanding any thing contained in the order of council, in April, 1809, was held not to legalize an insurance on the vessel, being the property of an alien enemy. *Gregg and another* v. *Scott*, Holt, 129. Gibbs, C. J. 1815.

21. A licence to "British or neutral merchants" to import goods in a vessel bearing any flag except the French, authorizes the employing a vessel belonging to any other hostile nation. *Hagedorn* v. *Reid*, 3 Campb. 377. Ellenborough, C. J. 1813.

22. But if the goods be shipped at a hostile port, it will be presumed that they are the property of the enemy, and positive evidence must be produced to shew that they come within the terms of the licence. *Ibid.*

Sed vide *Robinson* v. *Touray*, 1 M. and S. 217.

23. A licence "to A. and B. on behalf of themselves and other British neutral merchants, permitting the vessel J. G. to sail *in ballast* from London to Holland, notwithstanding any thing contained in H. M.'s order in council of 26th April, 1809," held to be insufficient to legalize a policy on the ship in this voyage on

behalf of the owner, an alien enemy. *Gregg and another* v. *Scott*, 4 Campb. 339. Gibbs, C. J. 1815.

And see *Muller* v. *Gernon*, 3 Taunt. 394; *Gray* v. *Lloyd*, 4 Taunt. 136; *Wainhouse* v. *Cowie*, *ibid.* 178.

B. (d) *Illegal voyage.*

24. An insurance upon a vessel licensed to sail without convoy, is not vitiated by a mis-description of the force of the vessel in the licence. *Edwards* v. *Footner*, 1 Campb. 530, 2. Ellenborough, C. J. 1808.

25. A voyage to a place within the limits of the South Sea Company's charter, is not legalized by a *retrospective* licence. *Hobbs* v. *Hannam*, 3 Campb. 93. Ellenborough, C. J. 1811.

And see *Bell* v. *Janson*, 1 M. and S. 201; *Jacob* v. *Jansen*, 3 Taunt. 534. Supra, B. (b) 17, 18; *Toulmin* v. *Anderson*, 1 Taunt. 227; *Hodgson* v. *Fullarton*, 4 Taunt. 787.

26. Although the goods brought home are the proceeds of the outward cargo of a ship, to which a prospective licence was regularly granted. *Cowie* v. *Barber*, 4 Campb. 100. Ellenborough, C. J. 1814.

And the court set aside a verdict for the plaintiff.

N. The reporter states that the plaintiff was nonsuited; but in 4 M. & S. 16, it is said that the court set aside a verdict found for the plaintiff, under his lordship's direction.

B. (e) *Property of master and mariners.*

27. A policy on money lent to the captain, payable out of the freight, is illegal upon the face of it, and the assured can neither sue for a loss, nor recover back the premium.

Wilson v. *Royal Exchange Assurance Company*, 2 Campb. 626. Ellenborough, C. J. 1811.

And see Pothier, Traité du Contrat d' Assurance, chap. 1. sect. 2. num. 36, 9. *King* v. *Glover*, 2 N. R. 206; *Siffken* v. *Allnutt*, 1 M. & S. 39, 40. post. LIEN, A. (a).

C. INTEREST.

(And see post, E. (d).)

C. (a) *Expected profits.*

28. An expectation of commissions upon the freight of goods not loaded at the time of the loss, is not an insurable interest. *Knox* v. *Wood*, 1 Campb. 543. Ellenborough, C. J. 1808.

See *Flint* v. *Le Mesurier*, Park. *Davidson* v. *Willasey*, 1 M. and S. 313.

29. But profits upon a cargo actually loaded, are capable of being ascertained and may be insured even in an *open* policy. *Eyre and another* v. *Glover*, 3 Campb. 276. Ellenborough, C. J. 1812.

And the court of K. B. refused a rule for a new trial; 16 East, 218.

And see *Forbes* v. *Aspinall*, 13 East, 323; *Forbes* v. *Cowie*, Park, post, pl. 62, 64. WITNESS, C. (h).

C. (b) *Prize.*

30. The captors of property taken in a joint expedition by the navy and army against a land fortress, have an insurable interest from the moment of the capture. *Stirling, bart.* v. *Vaughan*, 2 Campb. 225. Ellenborough, C. J. 1809.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 11 East, 619.

And see *Routh* v. *Thompson*, 13 East, 274, 9, 88. Pothier, Traité du Contrat d' Assurance, chap. 1. sect. 2. num. 38.

31. A condemnation in the admiralty court, is conclusive evidence of property in the captors. *Stirling* v. *Vaughan*, 2 Campb. 225, 9. Ellenborough, C. J. 1809.

C. (c) *Trust property.*

32. An executor has an insurable interest in a life annuity granted to the testator. *Tidswell* v. *Ankerstein*, Peake, 151. Kenyon, C. J. 1792.

C. (d) *Double insurance.*

33. Freighter covenants to pay the owner the full value of the ship if lost;

the latter has still an insurable interest. *Hobbs* v. *Hannam*, 3 Campb. 93. Ellenborough, C. J. 1811.

Acc. Marsh. Ins. 146. *Newby* v. *Reed*, 1 Bla. 416. Abb. 25. Sed vide Pothier, Traité du Contrat d' Assurance, chap. 1. sect. 2. num. 33.

34. A creditor insuring the life of his debtor, *and charging his accounts annually with the premiums*, has no further interest in the policy than as an indemnity; and if after the settlement of the accounts, the creditor receive the sum insured from the insurers, the amount may be recovered by the executors of the debtor, in an action for money had and received. *Holland, executor of O'Hara*, v. *Smith, executor of Kendrich*, 6 Esp. 11. Ellenborough, C. J. 1806.

35. In an action on a valued policy, it is no defence that the assured have received the amount of this valuation from underwriters on another policy, if the subject matter insured be of a value equal to the sum received and that sought to be recovered. *Bousfield* v. *Barnes*, 4 Campb. 228. Ellenborough, C. J. 1815.

C. (e) *Interest, how described.*

36. An averment that A. is interested in the whole sum insured, is supported by evidence of his being jointly interested with B. *Page* v. *Fry*, 3 Esp. 185. Eldon, C. J. 1800.

See *Feise* . *Aguilar*, 3 Taunt. 506.

37. Especially where A. was originally the sole owner. *Ibid.*

And the court of C. P. discharged a rule for a new trial. *Ibid.* and 2 Bos. and Pul. 240.

Sed vide *Bell* v. *Ansley*, Selw. 920. S. C. 16 East, 141.

38. So it was held that the interest might be averred to be in A. though the policy laid it in A. and B. *Marsh* v. *Robinson*, 4 Esp. 98. Le Blanc, J. 1802.

39. The parties interested are described in the policy, as "trustees of A. and Co." This may be considered their stile of dealing for this purpose. *Hibbert and others* v. *Martin*, 1 Campb. 538. Ellenborough, C. J. 1808.

S. C. not S. P. Park, 299, n. and see *Wright* v. *Welbie*, 1 Chitty, 49.

C. (f) *Interest, how proved.*

40. Interest in ship is sufficiently proved by acts of ownership. *Amery* v. *Rogers*, 1 Esp. 207. Kenyon, C. J. 1794.

Sed vide ante, Evidence, pl. 108.

41. Until contrary evidence is offered. *Thomas and others* v. *Foyle*, 5 Esp. 88. Ellenborough, C. J. 1803.

S. P. *Robertson* v. *French*, 4 East, 136.

42. But the production of the register is conclusive. *Marsh* v. *Robinson*, 4 Esp. 98. Le Blanc, J. 1802.

S. P. *Camden* v. *Anderson*, 5 T. R. 709. Sed vide *M'Iver* v. *Humble*, 16 East, 169.

43. The interest in goods is proved by the production of the bill of lading, and by the testimony of the captain that he had the packages on board. *M'Andrew* v. *Bell*, 1 Esp. 373. Kenyon, C. J. 1795.

44. The custom-house copy of the searcher's report, produced by the officer in whose custody it is lodged, is evidence of the actual shipment of the goods therein specified. *Johnson* v. *Ward*, 6 Esp. 47, 8. Chambre, J. 1806.

D. Ship.

D. (a) *Seaworthiness.*

45. A vessel which is defective in sails necessary to facilitate her escape from an enemy, and to enable her to proceed with expedition, is not seaworthy. *Wedderburn and others* v. *Bell*, 1 Campb. 1. Ellenborough, C. J. 1807.

46. Or if the crew be insufficient. *Ibid.*

S. P. *Hunter* v. *Potts*, Selw. 907, n. Acc. *Law* v. *Hollingsworth*, 7 T. R. 160.

47. But where upon a whale and seal voyage, the crew become insufficient for the whale fishery, the underwriters are liable for a loss happening during the prosecution of the seal fishery. *Hucks* v. *Thornton*, Holt. 30. Gibbs, C. J. 1815.

48. A policy *at and from* a foreign port, does not attach, where the vessel on her arrival outwards is so shattered

as to be unable *to be in port* in reasonable security. *Parmeter* v. *Cousins*, 2 Campb. 235. Ellenborough, C. J. 1809.

And see *Forbes* v. *Wilson*, Park, 299, n.; *Hibbert* v. *Martin*, *ibid.*

D. (b) *Neutrality.*

(See post, G. (c).)

E. Risk.

E. (a) *Risks insured against by the common policy.*

49. Where damaged goods are sold at credit, the underwriters are only bound to pay the difference between the sound value and the price of the goods calculated at the course of exchange at the period of the sale, and cannot be required to indemnify the assured against a further loss, occasioned by the depreciation of the foreign currency at the expiration of the credit. *Thellusson* v. *Bewick*, 1 Esp. 77. Kenyon, C. J. 1793.

50. Underwriters are not liable for an injury sustained by a vessel which has been lawfully seized by the crown, though she may be afterwards restored to her former owner. *Pipon* v. *Cope*, 1 Campb. 434. Ellenborough, C. J. 1808.

51. No *interest* can be recovered on the sum insured. *Kingston* v. *M'Intosh*, 1 Campb. 518. Ellenborough, C. J. 1808.

52. On a policy on freight the assured can only recover in respect of the cargo actually on board, unless there be an engagement to provide a full cargo. *Patrick* v. *Eames*, 3 Campb. 441. Ellenborough, C. J. 1813.

And see ante, pl. 28, 29, post, E. (c) 64.

E. (b) *Risks excluded by the common memorandums.*

(And see post, F. (e).)

53. Where the vessel is stranded and the goods are damaged, it is immaterial upon the construction of the common memorandum, whether the injury was *occasioned* by the stranding or not. *Burnett* v. *Kensington*, 1 Esp. 416. Kenyon, C. J. 1795.

And the court of K. B. after a fourth trial, ordered the postea to be delivered to the plaintiff; 7 T. R. 210.

And see *Dobson* v. *Bolton*, 4 M. & S. 80. 1 Marsh. Ins. 239; *Baring* v. *Henkle*, *ib.*

54. And it is sufficient if the vessel be driven on shore, and remain there two hours. *Harman* v. *Vaux*, 3 Campb. 429. Ellenborough, C. J. 1813.

Or be fixed upon a rock from 15 to 20 minutes. *Baker* v. *Towry*, 1 Stark. 436. Ellenborough, C. J. 1816.

55. Semble, that where a vessel is driven on a reef of rocks, whereby she is so much damaged that it afterwards becomes necessary to run her ashore, the assured may recover particular average, as in a case of *stranding*. *Ibid.*

56. But it is not a *stranding* where a vessel strikes on a rock, and remains there a minute and a half, lying on her beam ends. *M'Dougle* v. *Royal Exch. Assurance Company*, 4 Campb. 283, 1 Stark. 130. Ellenborough, C. J. 1815.

And the court refused a rule for a new trial; 4 M. & S. 503.

E. (c) *Duration of risk.*

57. Where a party insures goods to Jamaica, and the vessel after remaining a month at one port in the island, proceeds with the goods to another port, the insurance continues till her arrival at the latter. *Leigh* v. *Mather*, 1 Esp. 411. Kenyon, C. J. 1795.

58. But where the same person insures *ship and goods*, the underwriters are discharged on her arrival at any port in the island. *Ibid.*

59. A policy on goods to the East Indies, until arrival at the last place of discharge on the outward voyage, ceases when the ship has delivered the company's outward cargo at a port in the East Indies, and will not protect the goods to a market in an intermediate voyage made by the ship after taking in part of her cargo for Europe. *Ibid.*

Sed vide S. C. Park, 52.

60. Insurance on a voyage to Martinique and all or any of the islands, does not cover a loss incurred while the vessel is detained at Antigua for the joint purpose of disposing of the residue of

her cargo and obtaining a return freight. *Inglis* v. *Vaux*, 3 Campb. 437. Ellenborough, C. J. 1813.

61. Held, that an underwriter is liable from the time of signing the memorandum, if a policy be afterwards executed. *Thompson* v. *Donaldson*, 3 Esp. 63. Kenyon, C. J. 1799.

Sed vide post, P. (a) pl. 219.

62. Where goods insured until safely landed, are taken out of the vessel by a *public* lighterman, though employed by the consignee, the underwriters are not discharged. *Hurry and Schneider* v. *Royal Exchange Assurance Company*, 3 Esp. 289. Eldon, C. J. 1801.

And the court discharged a rule for entering a nonsuit; 2 B. & P. 430.

63. S. P. ruled in *Rucker* v. *London Ass. Comp.* 3 Esp. 290. Buller, J. 1784.

S. C. 2 Bos. and Pull. 432, n. Sed vide *Strong* v. *Natally*, 1 N. R. 16.

64. Freight is insured *at and from* Hayti. Part of the outward cargo is bartered for produce, after which the ship is wrecked; the remainder of the outward cargo is saved, and exchanged for produce. The underwriters are only liable for the freight of the *produce* actually shipped. *Forbes* v. *Cowie*, 1 Campb. 520. Ellenborough, C. J. 1808.

S. C. Park. Acc. *Forbes* v. *Aspinall*, 3 East, 323. See ante pl. 28, 29, 52.

65. Where goods are insured for a limited period, and an injury is discovered which cannot be distinctly referred to the period of insurance, the underwriters are entirely discharged. *Parkin* v. *Tunno*, 2 Campb. 59. Ellenborough, C. J. 1809.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 11 East, 22.

And see *Burnett* v. *Kensington*, 7. T. R. 210.

66. A policy *at* and *from* Riga attaches as soon as the ship arrives there in physical safety, though under great danger of seizure and condemnation. *Bell and others* v. *Bell*, 2 Campb. 475. Ellenborough, C. J. 1810.

And the court refused to grant a rule for a new trial on this ground. *Ibid.*

Vide tamen, *Horneyer* v. *Lushington*, 15 East, 46.

67. It is stipulated, "that if the ship shall not load a cargo at Riga by any act of the Russian government, the assured shall recover as for a total loss." The ship is condemned before her outward cargo is discharged. The assured are entitled to recover. *Ibid.*

And the court of K. B. refused to grant, on this ground, a rule for a new trial. *Ibid.*

68. A ship is chartered to proceed in ballast to *Charente*, "where the freighter is to provide a full cargo." An insurance is effected at and from Sheerness to *Charente*, *from the date of the policy till she shall be arrived at Charente, and back to London* on freight, to be deemed interest *in the outward voyage*, although in ballast. Semble, that the former clause is not restrained by the latter, and that the policy will cover a loss by seizure on arrival, before any part of the cargo is shipped. *Mackenzie* v. *Shedden*, 2 Campb. 431. Ellenborough, C. J. 1810.

69. Policy at and from R[illegible] on ship and freight, is declared to be in continuation of a policy *to Riga, during the ship's stay there, and from thence home.* The ship is condemned at Riga before she has discharged her outward cargo. The *continuation* policy does not cover the outward freight. *Bell* v. *Bell, ubi supra.*

70. Goods on arrival at Archangel, are landed *as usual*, in the custody of custom-house officers. The underwriters are discharged, though the goods are seized by the Russian government before they are released by the custom-house officers. *Brown* v. *Carstairs*, 3 Campb. 161. Ellenborough, C. J. 1811.

70. A continuation policy on goods from A. B. to C., "beginning the adventure from the loading thereof," is not confined to goods loaded at A., but is to be understood to extend to goods put on board at the port of loading mentioned in the former policy. *Bell and others* v. *Hobson*, 3 Campb. 272. Ellenborough, C. J. 1812.

And see *Spitta* v. *Woodman*, 2 Taunt. 416. S. C. 16 East, 188, n. Case of the *William*, 5 Rob. A. R. 385. *Horneyer* v. *Lushington*, 15 East, 46; *Nonnen* v. *Reid*, 16 East, 176.

71. By demand and acceptance of that portion of the premium which is stipulated to be returned on arrival, the risque is closed; and the assured cannot resort to the underwriter in respect of a con-

tingency arising out of circumstances with which he was acquainted at the time of the settlement. *May and others* v. *Christie*, Holt, 67. Gibbs, C. J. 1815.

E. (d) *Short interest.*

72. An intire insurance of 600*l.* is effected on ship valued at 1000*l.* and cargo at 1000*l.* No cargo is shipped. The underwriters are only liable to the extent of 50*l.* per cent. on their respective subscriptions. *Amery* v. *Rogers*, 1 Esp. 207. Kenyon, C. J. 1794.

N. In this case the assured would be entitled to a return of premium in respect of the cargo.

73. Where a ship chartered for a particular voyage is guilty of a deviation after sailing upon it, though before any goods are loaded, the assured are not entitled to a return for short interest. *Moses and another* v. *Pratt*, 4 Campb. 297. Ellenborough, C. J. 1815.

74. After safe arrival it is too late to demand a return for short interest. *M'Culloch* v. *Royal Exchange Assurance Company*, 3 Campb. 406. Ellenborough, C. J. 1813.

And see Dougl. 471, note (F. 3). Ante, ASSUMPSIT, pl. 84. GAMING, pl. 17.

75. Where goods are *fraudulently* over-valued, the assured cannot recover the real value as short interest. *Haigh and others, assignees of Lazarus and Cohen* v. *De la Cour*, 3 Campb. 319. Ellenborough, C. J. 1812.

F. POLICY.

F. (a) *Stamp.*

(And see infra. pl. 86).

76. A policy produced with a proper stamp, may be shewn to have been signed before the stamp was affixed. *Roderick* v. *Hovil*, 3 Campb. 103. Ellenborough, C. J. 1811.

Sed vide post, pl. 114, STAMPS, D. 1.

77. Where the goods are to be declared and valued, the policy is void unless the stamp be sufficiently large to cover the value declared, calculating the fractional part of each distinct interest as a distinct 100*l.* *Rapp* v. *Allnut*, 3 Campb. 106, n. K. B. 1812.

S. C. 15 East, 601.

F. (b) *Alteration.*

78. An alteration in a policy as to the subject matter of the insurance, made after the risk has attached, without a fresh stamp, renders the instrument altogether invalid. *French and others, assignees of Hill*, v. *Patten*, 1 Campb. 72. Ellenborough, C. J. 1807.

And the court of K. B. discharged a rule for a new trial in an action upon the contract, in its original form; *ibid.* 180, b. and 9 East, 351; having previously granted a new trial after a verdict for the bankrupt on the policy in its altered state, 8 East, 373.

And see *Bathe* v. *Taylor*, 15 East, 412, 5; *Kensington* v. *Inglis*, 8 East, 273; *Hubbard* v. *Jackson*, 3 Taunt. 169.

79. Even against a party who has not assented to the alteration. *Fairlie* v. *Christie*, Holt 331. Gibbs, C. J. 1816.

And the court set aside a verdict for the plaintiff. 7 Taunt. 416. 1 Moore, 114.

And see Post. STAMPS, E.

80. A variance between the name by which a vessel is entered at the custom-house, and that inserted in the bill of lading, does not discharge the consignee from demurrage, unless his searches at the custom-house were thereby frustrated. *Harman* v. *Clarke*, 4 Campb. 159 Gibbs, C. J. 1815.

N. The variance in this case was merely in the translation and nontranslation of the definite article "die" prefixed to the name of the ship.

81. But the insertion of the name of the vessel in a different language, is not a material alteration. *Clapham and another, assignees*, v. *Cologan*, 3 Campb. 382. Ellenborough, C. J. 1813.

82. And where the voyage was originally described as "at and from A. and B." the addition of the words "both or either" is immaterial, the legal operation of the instrument, in both forms, being the same. *Ibid.*

F. (c) *Valued policy.*

83. A policy on goods *to be declared and valued*, if no declaration is made, must be considered as an open policy. *Harman and others* v. *Kingston*, 3 Campb. 150. Ellenborough, C. J. 1811.

84. A declaration of interest and value may be by parol. *Robinson* v. *Touray*, 3 Campb. 160. Ellenborough, C. J. 1811.

Sed vide Pothier, Traité du Contrat d' Assurance, chap. 2. sect. 2. num. 109.

85. But if not communicated to the underwriters, or written on the policy, is a nullity. *Ibid.*

86. It may be corrected without a fresh stamp, if made on a wrong ship, although the underwriters have put their initials. *Robinson* v. *Touray ubi supra*, and the court discharged a rule for a new trial, 1 M. & S. 218.

F. (d) *Description of the object of insurance.*

87. A policy on a voyage to *any* of the West India islands, will not cover a voyage to an island which, at the time of effecting the insurance, belonged to the enemy, although afterwards captured. *Neilson* v. *De la Cour*, 2 Esp. 619. Kenyon, C. J. 1797.

88. Where the insurance is on a voyage "to any port *in the Baltic*," witnesses may be called to prove that the *Gulph of Finland* is generally considered to be within the Baltic, though laid down by geographers as a distinct sea. *Uhde* v. *Walters*, 3 Campb. 16. Ellenborough, C. J. 1811.

And see ante, Evidence, 196, 7, 202. Sed vide *Weston* v. *Emes*, 1 Taunt. 115.

89. So a policy "at and from a port of loading in Amelia Island," in which there is no port, may be applied to a cargo shipped in another island higher up the river. *Moxon* v. *Atkins*, 3 Campb. 200. Ellenborough, C. J. 1811.

And see ante, Covenant, A. (b) 7.

90. An insurance on "stock in trade" does not cover goods purchased on a speculation unconnected with the party's usual business. *Watchorn* v. *Langford and others*, 3 Campb. 422. Ellenborough, C. J. 1813.

91. An insurance on "household furniture, linen, and wearing apparel," does not extend to a stock of linen-drapery goods. *Ibid.*

F. (e) *Construction of the usual memorandums.*

And see ante, E. (b).

92. Under an exception of average losses, not amounting to 5 per cent. the proportion of loss must be calculated with reference to the value of the cargo *at the time the loss happens*. *Rohl* v. *Parr*, 1 Esp. 445. Kenyon, C. J. 1796.

93. *Malt* is *corn* within the meaning of the memorandum, excepting *corn*, &c. from particular average. *Moody* v. *Surridge*, 2 Esp. 633. Kenyon, C. J. 1798.

G. Warranty.

G. (a) *What shall amount to a warranty.*

94. A declaration that the insurance is "on the cargo, *being* 1031 *hhds. of wine*," is not a warranty that no other goods shall be taken on board. *Muller* v. *Thompson*, 2 Campb. 6[illegible]. Ellenborough, C. J. 1811.

95. Insuring a vessel by *an English name*, is no warranty that she is English. *Clapham and another, assignees of Pearce*, v. *Cologan*, 3 Campb. 382. Ellenborough, C. J. 1813.

And see *Le Mesurier* v. *Vaughan*, 6 East, 382. S. C. 2 Smith, 492.

G. (b) *How construed.*

96. Policy on a vessel during one month remaining in Portsmouth harbour *securely moored*, is not vacated by the vessel's changing her mooring within the same harbour. ——— v. *Westmore*, 6 Esp. 109. Ellenborough, C. J. 1807.

G. (c) *Neutrality.*

97. A vessel *warranted American*, must be navigated with all the papers required by the treaties between America and the belligerent. *Rich* v. *Parker*, 2 Esp. 615. Kenyon, C. J. 1797.

And the court of K. B. gave judgment for the defendant on a special verdict; 7 T. R. 705.

98. A warranty of neutrality is not complied with, where it appears that the owner, though a native of a neutral country, is resident with his family in the states of a belligerent. *Tabbs* v.

Bendelack, 4 Esp. 108. Kenyon, C. J. 1801.

S. C. 3 Bos. & Pull. 207, n. And see ante, A. (a) post, P. (a).

G. (d) *Time of sailing.*

99. A warranty to sail from P. on or before the 23d, is not satisfied by sailing to Q., which is the port of P., on the 28th, clearing the vessel, and completing the crew on the 29th, and sailing from Q. on the 30th. *Ridsdale and others* v. *Newnham*, 4 Campb. 111. Ellenborough, C. J. 1814.

And the court refused a rule for a new trial. *Ibid.* and 3 M. & S. 455.

100. A warranty to *sail* before a particular day on a voyage from Surinam, *and all or any of the West India islands*, is satisfied by the vessel's sailing *with a cargo* from Surinam within the time, though she call at the islands *for convoy* after the day. *Wright* v. *Shiffner*, 2 Campb. 247. Ellenborough, C. J. 1809.

And the court refused a rule for a new trial. *Ibid.* and 11 East, 515.

And see I. (c) 1.

101. But it was held that a ship warranted to depart on or before a given day, must actually be out of port on that day, and that it is not enough that she broke ground and commenced the homeward voyage, so as to have satisfied a warranty to sail on that day. *Moir* v. *Royal Exchange Assurance Company*, 4 Campb. 84. Ellenborough, C. J. 1814.

And the court refused a rule to set aside nonsuit. *Ibid.*

G. (e) *Sailing with convoy.*

(And see post, pl. 148.)

102. A warranty to sail with convoy is broken if the vessel set sail without *sailing orders*, which it was in the power of the captain to obtain. *Anderson* v. *Pitcher et ux.* 3 Esp. 124. Eldon, C. J. 1800.

And the court of C. P. discharged a rule for a new trial; 2 Bos. & Pull. 164.

And see *France* v. *Kirwan*, Park, 447; commented upon in Marshall, 369, n. *Hibbert* v. *Pigou*, Park, 443. S. C. Marshall, 369; *Webb* v. *Thomson*, 1 Bos. & Pull. 5; *Wainhouse* v. *Cowie*, 4 Taunt. 178.

103. Ships sailing from foreign ports are not within the restrictions of the convoy act, unless there be persons at those ports, authorised by the admiralty to grant convoy or license. *D'Aguilar* v. *Tobin*, Holt, 185. Gibbs, C. J. 1816.

104. Nor will such an authority be implied upon the circumstance of the admiral on the station, having usually appointed convoys. *Ibid.*

105. Brokers effecting a policy without notice that it is not on account of A. from whom they receive the order, have a lien upon it for their general balance due from A., and have a right to apply in satisfaction of that balance, money received upon the policy, as well after as before notice, that it belongs to B. *Mann* v. *Forrester and another*, 4 Campb. 60. Ellenborough, C. J. 1814.

106. But if after such notice they pay the surplus to A., the amount may be recovered from them by B., in an action for money had and received. *Ibid.*

107. A bill of lading stating the ship to be bound to the port of destination, with convoy, amounts to an undertaking binding on the owner, that the ship shall sail with convoy. *Magalhaens* v. *Busher*, 4 Campb. 54. Ellenborough, C. J. 1814.

108. It is no excuse for not sailing with convoy that the ship was prevented from joining the convoy by the weather. *Ibid.*

109. Where a policy warrants that the ship, if she proceed on a particular day, shall sail with convoy, she may sail without convoy from her loading port to the place of rendezvous for convoy for the voyage, although there be convoy for ships between the loading port and place of rendezvous. *Warwick* v. *Scott*, 4 Campb. 62. Ellenborough, C. J. 1814.

110. A ship is to be considered as sailing with convoy if she join and receive sailing instructions within the limits of the port, although the convoy drop down 15 leagues from the place of loading several days before such ship, she being detained for want of a pilot. *Ridsdale and others* v. *Shedden*, 4 Campb. 107. Ellenborough, C. J. 1814.

111. Where no convoys are appointed at the port from which a ship commences

her voyage, she is not bound to wait for convoy at a port, in the course of the voyage, from which convoys are appointed. *Park* v. *Hamond*, 4 Campb. 344. Gibbs, C. J. 1815.

112. But it is a sufficient defence to shew that the ship was delayed by the default of the plaintiff's agent in not putting on board the plaintiff's goods, and that after receiving them the master made every practicable exertion to join the convoy. *Ibid.*

H. Representation.

H. (a) *When material.*

113. A. paid 4 guineas to B. as an insurance against being drawn in the militia, under 47 Geo. III. cap. 71. and took a receipt which stated, "that the subscriptions were received for the purpose of indemnifying, &c. until a certain day, *at which period all ballottings under the act were directed to cease.*" A. was drawn after the day. Held, that he was not within the terms of the insurance; but that he was entitled to a return of premium on the ground of misrepresentation. *Duffell* v. *Wilson*, 1 Campb. 401. Ellenborough, C. J. 1808.

And see *Astley* v. *Ray*, 2 Taunt. 214.

114. A representation made to underwriters on *goods* when their names are put down on the *slip*, must be substantially complied with, unless it be withdrawn or qualified before the policy is signed. *Edwards* v. *Footner*, 1 Campb. 530. Ellenborough, C. J. 1808.

Sed vide *Bell* v. *Carstairs*, 14 East, 374, 82, 93.

H. (b) *How made.*

115. A representation made to an underwriter who is not the first on the policy, cannot be taken advantage of by a subsequent underwriter. *Bell and others* v. *Carstairs*, 2 Campb. 544. Ellenborough, C. J. 1810.

S. C. not S. P. 14 East, 374.

116. Calling a ship *by an English name* does not amount to a representation of her being an English ship. *Clapham and another, assignees of Pearce*, v. *Cologan*, 3 Campb. 382. Ellenborough, C. J. 1813. Ante, pl. 80, 81.

H. (c) *How construed.*

117. On a voyage from St. Domingo to Europe, a representation that the vessel will sail in the month of October, implies, that she will not sail till the 25th, or at the soonest the 10th or 15th of that month. *Chaurand and another* v. *Angerstein*, Peake, 43. Kenyon, C. J. 1791.

118. A broker effecting an insurance from Russia, on a ship then on her outward voyage, says, "There is a cargo ready for her." This representation expresses merely expectation and belief; and the underwriter is not discharged by the delay of the vessel for want of a cargo. *Hubbard* v. *Glover*, 3 Campb. 313. Ellenborough, C. J. 1812.

And see *Bowden* v. *Vaughan*, 10 East, 415; post, Vendor and purchaser, G. (a) 2.

I. Concealment.

I. (a) *When material.*

119. A vessel is insured after she has been long at sea, which circumstance is not communicated to the broker, who is consequently unable to answer the inquiries of the underwriter. This is a fraudulent concealment. *Webster* v. *Foster*, 1 Esp. 407. Kenyon, C. J. 1795.

Acc. *Fillis* v. *Brutton*, Park, 250; *Ratcliffe* v. *Shoolbred*, Marshall, 468; *Carter* v. *Boehm*, 1 Bla. 593. 3 Burr. 1905. Sed vide, 5 Taunt. 430. 1 Marsh, 117.

120. So where a party delayed insuring until after the arrival of another vessel, which sailed at the same time with the ship insured, the non-communication of this circumstance was held to vacate the policy. *M'Andrew* v. *Bell*, 1 Esp. 373. Kenyon, C. J. 1795.

Acc. *Bridges* v. *Hunter*, 1 M. & S. 15.

121. Secus, where such arrival is in Lloyd's list. *Friere* v. *Woodhouse*, Holt, 592. Burrough, J. 1817.

122. At the time of effecting an insurance, the underwriter is entitled to be informed of all the circumstances known

to the assured with respect to the actual state of the vessel. *Freeland and others* v. *Glover*, 6 Esp. 14. Ellenborough, C. J. 1806.

123. But it is not necessary that he should be apprized of all the calamities which have previously befallen the vessel in the course of her voyage. *Ibid.*

And the court of K. B. discharged a rule for a new trial, on the ground that the letter communicated to the underwriters referred to a former correspondence, which they might have required to see; 7 East, 457, and 3 Smith, 424.

Acc. *Schoolbred* v. *Nutt*, Park, 300. S. C. Marshall, 475. Sed vide *Gladstone* v. *King*, 1 M. & S. 35. And see *Fort* v. *Lee*, 3 Taunt. 381.

124. It is customary for vessels on their arrival at Newfoundland to be employed in fishing, or to make an intermediate voyage before they load homewards, and in either case they are commonly protected during that period by a distinct insurance. A policy *at and from* Newfoundland must be construed with reference to this usage, of which the underwriters are bound to take notice. The insurance therefore does not attach upon the intermediate risk, nor is it vitiated by the non-communication of the fact. *Vallance* v. *Dewar*, 1 Campb. 503. Ellenborough, C. J. 1808. *Ougier* v. *Jennings*, 1 Campb. 505. Eldon, C. J. 1800.

125. And if the usage be general, it cannot be objected that it is in the alternative, or that it is not universal. *Vallance* v. *Dewar*, *ubi supra.*

126. So the underwriters are bound to take notice of a custom to load part of the cargo outside of Oporto bar, when the state of the river makes it more convenient. *Kingston* v. *Knibbs*, 1 Campb. 508, n. Ellenborough, C. J. 1808.

127. The broker is bound to communicate *facts* to the underwriter, but not the opinions and apprehensions occasioned by the facts. *Bell and others* v. *Bell*, 2 Campb. 475. Ellenborough, C. J. 1810.

And the court of K. B. discharged a rule for a new trial. *Ibid.*

128. Loose rumours need not be communicated; but the materiality of the facts, known and suppressed, is for decision of the jury. *Durrell and another* v. *Bederley*, Holt, 283. Gibbs. C. J. 1816.

129. The opinion of underwriters as to the materiality of the rumours, appears to be inadmissible. *Ibid.*

130. The non-communication of the damaged state of goods shipped, from which danger is likely to ensue, does not vitiate the policy, where these circumstances are unconnected with the cause of the loss. *Boyd* v. *Dubois*, 3 Campb. 133. Ellenborough, C. J. 1811.

And see post, K. (e) 153.

131. Carboys of vitriol are sometimes stowed on the deck, and sometimes bedded in sand in the hold, where they are considered safer. It is not necessary to apprize the underwriters that such carboys are intended to be stowed on deck. *Da Costa* v. *Edmunds*, 4 Campb. 142. Ellenborough, C. J. 1815.

K. Misconduct.

K. (a) *Delay.*

132. Where a vessel is insured at and from A. to B., a voluntary delay in proceeding upon the voyage, will avoid the policy. *Smith* v. *Surridge*, 4 Esp. 25. Kenyon, C. J. 1801.

133. Secus, where she remains in port for necessary repairs. *Ibid.*

134. Mere length of time intervening between the effecting of the insurance and the sailing of the vessel, is not sufficient to avoid the policy. *Grant* v. *King*, 4 Esp. 175. Ellenborough, C. J. 1803.

K. (b) *Deviation.*

135. Where sickness is set up as an excuse for deviation, it must be shewn that the surgeon was provided with medicines suited to the voyage. *Woolf* v. *Claggett*, 3 Esp. 257. Eldon, C. J. 1800.

And see *Tatham* v. *Hodgson*, 6 T. R. 656. Pothier, Traité du Contrat d' Assurance, chap. 1. sect. 2. num. 51.

136. Under a policy "at and from Antigua to England, with liberty to touch at all or any of the West India islands, Jamaica included." The ship

may touch at any of the islands, though not in the direct course from Antigua to England, and stay at such as she visited the time necessary to complete her homeward cargo. *Metcalfe* v. *Parry*, 4 Campb. 123. Gibbs, C. J. 1814.

137. Liberty to touch at an intermediate port does not include liberty to break bulk there. *Stitt* v. *Wardell*, 2 Esp. 610. Kenyon, C. J. 1797.

S. C. Park, 388. Sed vide *Raine* v. *Bell*, 9 East, 195; *Cormack* v. *Gladstone*, 11 East, 347; *Laroche* v. *Oswin*, 12 East, 131; *Urquhart* v. *Barnard*, 1 Taunt. 450.

138. A vessel insured from London to Berbice, with liberty to trade at any ports and places, puts into Madeira, and, by staying there, loses her convoy. This is a deviation. *Williams* v. *Shee*, 3 Campb. 469. Ellenborough, C. J. 1813.

139. And the underwriters are discharged, although the policy was effected upon sight of a letter from the master, stating that he had lost the convoy, and had passed Barbadoes, and the words "at sea" were inserted after the clause "beginning the adventure upon the said goods and merchandizes, from the loading thereof aboard the said ship." *Redman* v. *London*, 3 Campb. 503. Ellenborough, C. J. 1813.

140. Leave to discharge part of the cargo does not imply leave to take in other goods. *Sheriff* v. *Potts*, 5 Esp. 96. Ellenborough. C. J. 1803.

S. C. Park, 389.

141. Where a vessel, which is prevented from entering her port of destination, proceeds to another point with the intention of returning to the port when the impediment shall be removed, the underwriters may *perhaps* remain liable. *Blackenhagen* v. *London Assurance Company*, 1 Campb. 454. Ellenborough, C. J. 1808.

142. But if she abandon her voyage, and be lost on her way back to her place of outfit, they are clearly discharged. *Ibid.*

143. S. P. ruled on a trial between the same parties. 2 Campb. 456. Mansfield, C. J. 1808.

And the court of C. P. set aside a verdict given for the plaintiff, contrary to the direction of the chief justice. *Ibid.*

144. But it was afterwards left to the jury as a question of fact, whether the voyage had been abandoned or not; and the plaintiff again had a verdict. *Ibid.* 564. Mansfield, C. J. 1809.

145. So if the captain proceed to a neghbouring port, the underwriters are discharged. *Parkin* v. *Tunno*, 2 Campb. 59. Ellenborough, C. J. 1809.

And see *Heselton* v. *Allnut*, 1 M. & S. 46.

146. Where a ship, to avoid a danger for which the insurers would have been liable, runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss. *O'Reilly and others* v. *Gonne*, 4 Campb. 249. Gibbs, C. J. 1815.

147. Secus, where the danger avoided is excepted in the policy. *O'Reilly and others* v. *Royal Exchange Assurance Company*, 4 Campb. 246. Gibbs. C. J. 1815.

148. A vessel may deviate from her track to seek convoy, when it is for the common good and preservation, and is not prohibited by the terms of the policy. *D'Aguilar* v. *Tobyn*, Holt, 185. Gibbs, C. J. 1816.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 11 East, 22.

149. Leave *to see prizes into port*, does not authorize the remaining in port whilst a prize is repaired. *Jarratt* v. *Ward*, 1 Campb. 265. Ellenborough, C. J. 1808.

And see *Jolley* v. *Walker*, Park, 396; *Parr* v. *Anderson*, 6 East, 202. S. C. 2 Smith, 316. S. C. upon a new trial, Park, 397, 8.

150. The master is ordered by the commander of a king's ship to put to sea to examine a strange sail; which order he obeys without compulsion or remonstrance. The policy is vacated. *Phelps* v. *Auldjo*, 2 Campb. 350. Ellenborough, C. J. 1809.

S. C. Park, 386. And see *Page* v. *Thompson*, *ibid.* 109, n.; *Forster and others* v. *Christie*, 11 East, 205.

K. (c) *Negligence.*

151. Underwriters are not discharged by the act of the insured in taking on

board 3 prisoners on parole, who occasion a mutiny terminating in the loss of the vessel. *Toulmin* v. *Inglis*, 1 Campb. 421. Ellenborough, C. J. 1808.

K. (d) *Carrying simulated papers.*

152. Where no liberty is given in the policy to take *simulated* papers, and the vessel is condemned for carrying them, the assured cannot recover. *Horneyer* v. *Lushington*, 3 Campb. 85. Ellenborough, C. J. 1811.

K. (e) *Irregular clearance.*

153. The non-insertion in the *manifest* of the goods insured, does not vacate the policy where the loss is unconnected with the omission. *Carruthers* v. *Gray*, 3 Campb. 142. Ellenborough, C. J. 1811.

And the court of K. B. refused a rule for a new trial, the omission being no ground for seizure; 15 East, 35.

And see ante, I. (a) 130.

K. (f) *Breach of convoy act.*

(And see ante, G. (c).)

154. A policy is not avoided by *an agent* of the assured's being "privy to or *instrumental in* causing the ship to sail without convoy, unless he had an authority from his principal for that very purpose. *Carstairs and others* v. *Allnutt*, 3 Campb. 497. Ellenborough, C. J. 1813.

N. As to *privity*, see *Wainhouse* v. *Cowie*, 4 Taunt. 178; *Wilson* v. *Foderingham*, 1 M. & S. 468. *Darby* v. *Newton*, 6 Taunt. 544. 2 Marsh. 252. S. C.

155. In an action on a policy of insurance, it will be presumed that the ship complied with the provisions of the convoy act, till the contrary is proved. *Thornton and others* v. *Lance and others*, 4 Campb. 231. Ellenborough, C. J. 1815.

And see Evidence, K.

156. To avoid an insurance, even on ship, for a contravention of the convoy act, it must be shewn that the assured was privy to such contravention. *Metcalfe* v. *Parry*, 4 Campb. 123. Gibbs, C. J. 1815.

L. Loss.

L. (a) *By perils of the seas.*

(And see ante, E. (b) 2, 3.)

157. Destruction of the vessel by worms at sea, is not a loss *by perils of the seas*. *Rohl* v. *Parr*, 1 Esp. 445. Kenyon, C. J. 1796.

158. Nor where one English ship sinks another, supposing her to be an enemy. *Cullen* v. *Butler*, 4 Campb. 289. Ellenborough, C. J. 1815.

159. An exception of "perils of the sea," extends to a loss arising from running foul of another vessel by misfortune. *Buller and others* v. *Fisher and others*, 3 Esp. 67. Kenyon, C. J. 1799.

N. Or by negligence; *Smith* v. *Scott*, 4 Taunt. 126. As to both points, see Pothier, Traité du Contrat d' Assurance, chap. 1. sect. 2. num. 50.

160. A vessel wrecked by the barratry of the master, may be stated to have been lost by the *perils of the seas*. *Heyman and others* v. *Parish*, 2 Campb. 149. Ellenborough, C. J. 1809.

And see *Smith* v. *Scott*, 4 Taunt. 127, 8.

161. Where a loss is to be inferred from the want of intelligence, it must be proved that the vessel set sail upon the voyage mentioned in the policy. *Cohen* v. *Hinckley*, 2 Campb. 51. Ellenborough, C. J. 1809.

162. For this purpose the production of the convoy bond, subscribed with an official memorandum, "for Quebec," is *primâ facie* evidence. *Ibid.*

163. Or the production of the charter-party. *Ibid.*

S. C. not S. P. 1 Taunt. 249.

164. Or a licence for such voyage. *Marshall* v. *Parker*, 2 Campb. 70. Ellenborough, C. J. 1809.

165. It is not necessary to shew that the vessel has not been heard of at her port of destination; it is sufficient if no intelligence have reached this country. *Twemlow* v. *Oswin*, 2 Campb. 85. Ellenborough, C. J. 1809.

166. The presumption as to the loss of a missing ship, is governed wholly by circumstances. *Houstman* v. *Thornton*, Holt, 242. Gibbs, C. J. 1816.

167. If after a payment founded upon such presumption, the vessel re-appears, she will belong to the underwriters, as upon an abandonment. *Ibid.*

And see *Green* v. *Brown*, 2 Stra. 1199. *Newby* v. *Read*, Park, 85. Pothier, Traité du Contrat d' Assurance, chap. 3. sect. 1. num. 119.

168. Sugars were insured from Tortola to London, the vessel having received damage put back and was declared unfit to proceed. No ship could be found to bring the whole cargo or the greater part of it; and the goods, though not injured, were sold for a small sum. Held to be a total loss, the voyage in contemplation being lost. *Manning* v. *Newnham*, in B. R. T. T. 1782, read by Sir Vicary Gibbs from a note taken by himself, and recognised in *Wilson* v. *Royal Exchange Assurance Company*, 2 Campb. 623. Ellenborough, C. J. 1811.

S. C. more fully reported, Marshall, 585.

169. But if the assured have an opportunity of transhipping the goods insured, and thus continuing the voyage, they have no right to abandon, and cannot recover as for a total loss. *Wilson* v. *R. E. A. Company, ubi supra.*

And see post, M.

170. Although the goods have, in a certain degree, been damaged. *Anderson* v. *Wallis*, 3 Campb. 440. Ellenborough, C. J. 1813.

And a nominal verdict for the plaintiff was set aside: 2 M. & S. 240.

171. Where after shipwreck the residue of the goods is got on shore, and there stolen, it is a total loss by the perils of the sea without an abandonment. *Bondrett* v. *Hentigg*, Holt, 149. Gibbs, C. J. 1816.

L. (b) *By fire.*

172. The burning of a vessel to prevent her falling into the hands of the enemy, is a loss by *fire*. *Gordon* v. *Rimmington*, 1 Campb. 123. Ellenborough, C. J. 1807.

S. P. Pothier, Traité du Contrat d' Assurance, chap. 1. sect. 2. num. 52.

173. Underwriters are not liable for a loss by fire, arising from the bad condition in which the goods were loaded. *Boyd* v. *Dubois*, 3 Campb. 133. Ellenborough, C. J. 1811.

174. But they are not discharged by the non-communication of the state of the goods. *Ibid.* Ante, pl. 131.

175. Damage without combustion, caused by over-heating a sugar house, is not a loss by fire. *Austin and another* v. *Drew*, 4 Campb. 360. & Holt, 126. Gibbs. C. J. 1815.

And the court of C. P. refused a rule to set aside a verdict for the defendant. *Ibid.* and 2 Marsh. 130. 6 Taunt. 436.

L. (c) *By capture.*

176. If a vessel arrive after a hostile embargo is laid on, she is captured from the moment of her arrival; and though no actual seizure take place for several days, she cannot be considered as having been moored *in safety* 24 hours within the meaning of the usual clause in policies to that effect. *Minett and others* v. *Anderson*, Peake, 211. Kenyon, C. J. 1794.

177. A ship is driven by a storm near the enemy's coast, and is there captured. This is a loss by *capture*, and not by the *perils of the seas*. *Green and others* v. *Elmslie*, Peake, 212. Kenyon, C. J. 1794.

And see *Hodgson* v. *Malcolm*. 2 N. R. 336.

178. Where neutral property is taken by a British ship, and restored, the assured may recover as upon a loss by capture, although the sentence of the court of admiralty declare that there was good cause of seizure. *Visger* v. *Prescott*, 5 Esp. 184. Ellenborough, C. J. 1804.

And as to insurance against British capture, see *Kellner* v. *Le Mesurier*, 4 East, 396, 402. S. C. 1 Smith, 72. *Lubbock* v. *Potts*, 7 East, 449. S. C. 3 Smith, 397. *Barker* v. *Blakes*, 9 East, 233, 7, 9; *Forster* v. *Christie*, 11 East, 205, 7; *Glaser* v. *Cowie*, 1 M. & S. 52.

179. A vessel *barratrously* given up to the enemy, may be averred to have been lost by *capture*. *Arcangelo* v. *Thompson*, 2 Campb. 620. Ellenborough, C. J. 1811.

And see *Goldschmidt* v. *Whitmore*, 3 Taunt. 508.

180. A sentence of condemnation cannot be given in evidence, without proof that the vessel sailed on the voyage insured, and that she was captured. *Marshall* v. *Parker*, 2 Campb. 69. Ellenborough, C. J. 1809.

181. On a valued policy on goods, the assured are entitled to recover as for a total loss in case of condemnation, although the sentence direct the freight to be paid by the captors. *Ibid.*

182. A warranty against *capture in port*, does not extend to a capture in a place within the headlands of a river, but not within the limits of any port. *Baring* v. *Vaux*, 2 Campb. 541. Ellenborough, C. J. 1810.

And the court of K. B. refused a rule for a new trial. *Ibid.*

183. But if the place be the point at which vessels on the particular voyage usually unload, it is within the warranty. *Jarman* v. *Coape*, 2 Campb. 615. Ellenborough, C. J. 1811

And the court of K. B. refused a rule for a new trial. *Ibid.* and 13 East, 394.

184. A warranty to be free from seizure *in the port of discharge*, extends to a seizure made two miles from the harbour by custom-house officers, who come out in the pilot-boat. *Oom* v. *Taylor*, 3 Campb. 204. Ellenborough, C. J. 1811.

185. Or to a seizure made at the same distance from the harbour in a road-stead, where ships occasionally unload. *Maydhew* v. *Scott*, 3 Campb. 205. Ellenborough, C. J. 1811.

Acc. *Dalgleish* v. *Brooke*, 15 East, 295.

L. (d) *By detention.*

186. Upon a loss by seizure, detention, and confiscation, it is sufficient to prove that the property was forcibly seized by the officers of government without shewing a *condemnation*. *Carruthers* v. *Gray*, 3 Campb. 142. Ellenborough, C. J. 1811.

S. C. not S. P. 15 East, 35.

L. (e) *By barratry.*

187. A ship-owner cannot recover for a loss occasioned by an act of barratry, which he has not used ordinary diligence to prevent. *Pipon* v. *Cope*, 1 Campb. 434. Ellenborough, C. J. 1808.

188. A vessel *wrecked* by the barratry of the master, may be stated to have been lost by *the perils of the seas*. *Heyman and others* v. *Parish*, 2 Campb. 149. Ellenborough, C. J. 1809.

189. A capture made by collusion with the captain, may be described as a loss by *barratry*, or by *capture*. *Archangelo* v. *Thompson*, 2 Campb. 620. Ellenborough, C. J. 1811.

190. Smuggling by the captain under the direction of the agent of the *freighter*, cannot be treated by the *owner* as *barratry*. *Hobbs* v. *Hannam*, 3 Campb. 93. Ellenborough, C. J. 1811.

191. Prisoners of war rise and confine all the crew except one, who is heard on the deck in conversation with them: this is evidence of barratry to go to the jury. *Hucks* v. *Thornton*, Holt, 30. Gibbs, C. J. 1815.

L. (f) *General average.*

192. A ship attacked by a privateer, beats her off. Neither the damage to the ship, the ammunition, nor the charge of curing the seamen, is the subject of general average. *Taylor and others* v. *Curtis*, 4 Campb. 337. Holt. 192. Gibbs, C. J. 1815.

L. (g) *Particular average.*

(Vide ante, E. (b) F. (c) post, pl. 249.)

L. (h) *Stranding.*

(Vide ante, E. (b).)

M. ABANDONMENT.

M. (a) *Where allowed.*

(And see ante, pl. 169. post, pl. 217.)

194. The assured cannot, by abandoning, convert a partial, into a total, loss. *Thelluson* v. *Fletcher*, 1 Esp. 73. Kenyon, C J. 1793.

Acc. Pothier, Traité du Contrat d' Assurance, chap. 3. sect. 1. num. 115.

195. Where upon an insurance on sugars, a minute portion of each hogs-

head remains in specie, it is only an average loss. *Hedbergh and another* v. *Pearson*, Holt, 349. Gibbs, C. J. 1816.

196. Nor does the answer of the underwriters requesting the assured to do the best they can with the property, amount to an assent to such an abandonment. *Ibid.*

197. The assured cannot abandon on the ground that on approaching the port of destination he found it occupied by the enemy. *Lubbock* v. *Rowcroft*, 5 Esp. 50. Ellenborough, C. J. 1803.

198. Where goods are so damaged, as to be unfit for the market for which they were intended, the assured may abandon. *Gernon and another* v. *Royal Exchange Assurance Company*, Holt, 49. Gibbs, C. J. 1815.

And the court of C. P. discharged a rule for setting aside the verdict. *Ibid.* and 2 Marsh. 92.

199. In the case of an insurance on *freight*, a total loss cannot be recovered without an abandonment, if the cargo remain, although both ship and cargo have been sold. *Parmeter* v. *Todhunter*, 1 Campb. 541. Ellenborough, C. J. 1808.

200. On receiving intelligence of a capture, the assured abandon. It appears afterwards, that before the abandonment was made the vessel had been recaptured, and had continued her voyage. Ruled, that the underwriters were liable for a total loss. *Bainbridge and another* v. *Neilson*, 1 Campb. 237. Ellenborough, C. J. 1808.

S. P. adm. *Grigg* v. *Stoker*, Forrest, 12. And see *Bean* v. *Stupart*, Dougl. 11, 14; *Hamilton* v. *Mendes*, 2 Burr. 1198. S. C. 1 Bla. 276. *Everth* v. *Smith*, 2 M. & S. 278; *Ritchie* v. *Falkner*, *ib.* 290.

But upon a case reserved, the court of K. B. held, that only an average loss could be recovered. *Ibid.* 564, and 10 East, 329.

Vide tamen, *Smith* v. *Robertson*, 2 Dow, 474.

201. Whilst the timbers of a vessel hold together the assured cannot break her up, and charge the underwriter with a total loss, without an abandonment. *Bell and others* v. *Nixon*, Holt, 423. Dallas, J. 1816.

202. Underwriters, on goods, are only liable for an average loss, where the ship, being captured and re-captured, is sent into port, stripped of all her hands, and the captain, not being able immediately to procure a fresh crew, or to raise money to pay the salvage, sells ship and cargo, and breaks up the adventure. *Underwood* v. *Robertson*, 4 Campb. 138. Ellenborough, C. J. 1815.

M. (b) *At what time.*

203. Where, before abandonment, the ship insured is re-purchased from the captors by the master, the assured cannot recover as for a total loss. *M'Masters* v. *Shoolbred*, 1 Esp. 237. Kenyon, C. J. 1794.

204. Upon receiving intelligence of a loss, the assured must make his election to abandon or not; he cannot wait to see the issue. *Abel* v. *Potts*, 3 Esp. 243. Le Blanc, J. 1800.

S. P. Pothier, Traité du Contrat d' Assurance, chap. 3. sect. 2. num. 123.

205. But it appears to be stated to have been ruled, that the assured may abandon at any time before he can be shewn to have been conusant of a change of those circumstances which constituted the total loss. *Ibid.*

206. The assured is entitled to a reasonable time for examining the state of a perishable cargo, before he makes his election. *Gernon and another* v. *Royal Exch. Assurance Comp. ubi supra.*

And the court discharged a rule for setting aside the verdict. *Ubi supra.*

But he cannot delay sending a notice 17 days after the examination. *Aldridge* v. *Bell*, 1 Stark. 498. Ellenborough, C. J. 1816.

207. Consignee in Ireland of flax-seed from America, receives in February intelligence of the detention of the vessel by an embargo; but he does not abandon till the 11th of June. Held, that though the assured might *perhaps* have waited till the expiration of the sowing season, which was on the 10th of May, the abandonment on the 11th of June was too late. *Kelly and others* v. *Walton*, 2 Campb. 155. Ellenborough, C. J. 1809.

M. (c) *In what form.*

208. An abandonment must be express and positive. It cannot be implied from a request on the underwriters, to pay a total loss and to give directions as to the disposal of the cargo. *Parmeter* v. *Todhunter*, 1 Campb. 541. Ellenborough, C. J. 1808.

209. Nor can it be fettered with conditions. *M'Masters* v. *Shoolbred*, 1 Esp. 237, 9. Kenyon, C. J. 1794.

N. ADJUSTMENT.

N. (a) *How made.*

210. An agent authorised to underwrite a policy, may adjust a loss. *Richardson* v. *Anderson*, 1 Campb. 43, n. Ellenborough, C. J. 1805.

N. (b) *Effect of.*

211. An adjustment was held to be conclusive where there is no fraud, and no mistake of the law or of the fact. *Christian* v. *Coombe*, 2 Esp. 489. Kenyon, C. J. 1796.

S. P. *Voller* v. *Griffiths*, Selw. 876.

212. But it has since been held, that the adjustment will not shut out a ground of defence to which the attention of the party was not particularly drawn. *Shepherd* v. *Chewter*, 1 Campb. 274. Ellenborough, C. J. 1808.

213. And in two earlier cases it appears to have been considered merely as *primâ facie* evidence for the assured; and to have no other effect than that of throwing the burthen of proof upon the defendant. *Sheriff* v. *Potts*, 5 Esp. 96. Ellenborough, C. J. 1803. *Herbert* v. *Champion*, 1 Campb. 135. Ellenborough, C. J. 1807.

And see *Garron* v. *Galbraith*, Peake's Evid. 223, where the adjustment appears to have been considered as not even *primâ facie* evidence of the loss. *Gammon* v. *Beverley*, 1 Moore, 563.

O. ACTION.

O. (a) *Notice of loss.*

214. Where the underwriter is to adjust the loss in 3 months *after notice*, it is not necessary to prove a *direct* notice *from the assured*. *Abel* v. *Potts*, 3 Esp. 242. Le Blanc, J. 1800.

But see BILLS AND NOTES, G. (a).

O. (b) *Limitation of action.*

215. If the master barratrously carry the vessel out of her course, and afterwards deliver her up to a fraudulent purchaser, the loss is to be calculated from the period of the delivery, and not from the abandonment of the voyage. *Hibbert and others* v. *Martin*, 1 Campb. 538, 9. Ellenborough, C. J. 1808.

And see LIMITATION OF ACTIONS, A. (a) 2.

O. (c) *Pleadings.*

216. Where a policy in the common printed form, on ship and goods, contains a written memorandum, declaring the insurance to be on goods, the defendant is an assurer "on the premises in the policy mentioned." *Haughton* v. *Ewbank*, 4 Campb. 88. Ellenborough, C. J. 1814.

O. (d) *Payment of money into court.*

217. The payment of money into court, a count on a valued policy, averring a total loss, is not an admission that the loss is total. *Rucker and another* v. *Palsgrave*, 1 Campb. 557. Mansfield, C. J. 1808.

And the court of C. P. refused a rule to set aside nonsuit; 1 Taunt. 419.

And see *Waldron* v. *Coombe*, 3 Taunt. 162. But it is an admission of the interest as stated in the declaration; *Bell* v. *Ansley*, 16 East, 146.

P. EVIDENCE.

P. (a) *Mode of proof.*

218. Under a rule of court to admit a notarial copy of the condemnation of a vessel in evidence, such copy only establishes the fact of the condemnation, and is not evidence of the particular defects upon which the condemnation purports to be grounded. *Wright* v. *Barnards*, 2 Esp. 700. Kenyon, C. J. 1798.

219. The *slip* is not evidence of an insurance. *Rogers* v. *M'Carthy*, 3 Esp. 107. Kenyon, C. J. 1800. And see ante, pl. 61, 76, 114; post, 247.

220. Lloyd's books are evidence of a capture; but they are not evidence of notice to a particular person, unless coupled with other circumstances. *Abel* v. *Potts*, 3 Esp. 243. Le Blanc, J. 1800.

221. Semble, that the sentence of a prize court, sitting under a commission from a belligerent within a neutral state, would, if acquiesced in by the neutral, be conclusive upon the parties. *Smith* v. *Surridge*, 4 Esp. 25, 7. Kenyon, C. J. 1801.

222. S. P. contra, *Donaldson* v. *Thompson*, 1 Campb. 429. Ellenborough, C. J. 1808.

And see *Havelock* v. *Rockwood*, 8 T. R. 268, 74. Case of the *Flad Oyen*, 1 Rob. A. R. 135, 9, 40, 4. S. C. 8 T. R. 270, n. Case of the *Harmony*, 2 Rob. A. R. 210, n. S. C. 2 East, 477. Case of the *Christopher*, 2 Rob. 209.

223. That state is to be considered neutral, in which the form of an independent neutral government remains, although the country be occupied by the forces of the belligerent. *Donaldson* v. *Thompson*, *ubi supra*.

224. A shipwright may give his opinion upon facts stated by others, relating to the seaworthiness of the vessel. *Beckwith and others* v. *Sydebotham*, 1 Campb. 116. Ellenborough, C. J. 1807.

225. Although the parties making such statement are not examined at the trial; *comme semble*. *Thornton* v. *Royal Exchange Assurance Company*, Peake, 26. Kenyon, C. J. 1790.

226. The sentence of a foreign prize court is not evidence of facts which can be collected from it, merely by indirect inference. *Fisher* v. *Ogle*, 1 Campb. 418. Ellenborough, C. J. 1808.

And the court of K. B. refused a rule for a new trial. *Ibid.* and Park, 495, 6.

S. P. *Bernardi* v. *Motteux*, Dougl. 554, 74.

And see *Wright* v. *Simpson*, 6 Ves. 714, 30.

227. In an action for return of premium, the formal receipt in the policy is conclusive evidence of the payment of the premium. *Dalzell* v. *Mair*, 1 Campb. 532. Ellenborough, C. J. 1808.

Acc. *Airy* v. *Bland*, Park, 34. But see *Foy* v. *Bell*, 3 Taunt. 493; *Mavor* v. *Simeon*, *ibid.* 497, n; *De Gaminde* v. *Pigou*, 4 Taunt. 246; *Wilkinson* v. *Clay*, 6 Taunt. 110; ante, Evidence, pl. 125.

228. To prove the contents of a licence to trade with the enemy, which has been lost, it is sufficient to shew that the licence was put on board the vessel, and to produce an examined copy of the order in council, and of the licence in the secretary of state's office. *Eyre* v. *Palsgrave*, 2 Campb. 605. Ellenborough, C. J. 1801.

Acc. *Rhind* v. *Wilkinson*, 2 Taunt. 237.

229. Parol evidence, from a person who has read the licence, is inadmissible. *Ibid.*

230. A mere *representation* of neutrality is not conclusively falsified by the sentence of a prize court. *Von Tungeln* v. *Dubois*, 2 Campb. 151. Ellenborough, C. J. 1809.

231. The captain's protest is not evidence to invalidate a condemnation; it can be read only for the purpose of contradicting the captain's testimony. *Christian* v. *Coombe*, 2 Esp. 489. Kenyon, C. J. 1796.

And see ante, Evidence, pl. 116.

232. To prove a shipment of goods, a paper from the proper officer from the custom-house, stated by him to be a copy made by direction of an act of parliament of the official paper which contains an account of the cargo, and which goes with the ship, is evidence, without calling the captain or the searcher, upon whose report the instrument was drawn up; although the witness did not copy or compare the paper himself. *Johnson* v. *Ward*, 6 Esp. 47. Chambre, J. 1806.

233. But the bill of lading, being merely the declaration of the captain, is not evidence. *Dickinson* v. *Lodge*, 1 Stark. 226. Ellenborough, C. J. 1816.

234. To prove a vessel a *Dane*, it is *primâ facie* sufficient to shew that the captain usually hoisted Danish colours, and that he addressed himself to the Danish consul. *Arangelo* v. *Thompson*, 2 Campb. 620. Ellenborough, C. J. 1811.

235. An averment that a policy was effected by G. W. and Co. is proved

evidence that a policy was effected by G. and Co., the two firms having one member in common. *Dickson* v. *Lodge*, *ubi supra.*

236. The production of a letter addressed to S. L. in England, bearing the English ship-letter post-mark and directing an insurance, will support an averment that S. L. is the person residing in Great Britain, who received the order for effecting the insurance. *Ibid.*

Sed vide *Rex* v. *Watson*, post, LIBEL, C. (e). USURY, D.

P. (b) *Competency of witnesses.*

237. In an action upon an insurance on *goods*, the owner of the vessel is not a competent witness to prove her seaworthiness without a release. *Rotheroe and others* v. *Elton*, Peake, 84. Kenyon, C. J. 1791.

238. S. P. ruled in *Fox* v. *Lushington*, Peake, 85, n. Kenyon, C. J. 1795.

239. In an action on a loss by *barratry*, the master cannot be called to prove that the supposed barratrous act was done with the consent of the owner, without a release. *Bird* v. *Thompson*, 1 Esp. 339. Kenyon, C. J. 1795.

240. Underwriters on the same policy may be called to invalidate the testimony of the plaintiff's witness; although a verdict have been recovered in another action on the same policy, upon the same testimony. *Akers* v. *Thornton*, 1 Esp. 414. Kenyon, C. J. 1795.

241. An underwriter who settles a loss, upon an assurance that the amount shall be repaid in case the insurance should turn out to be invalid, is not a competent witness for an underwriter on the same policy. *Forrester and another* v. *Pigou*, 3 Campb. 380. Ellenborough, C. J. 1813.

242. It would have been otherwise if the witness had settled the loss unconditionally, and had entertained merely an *expectation* of re-payment. *Ibid.*

And as it did not clearly appear at what period the promise of re-payment was made, the court of K. B. granted a new trial; 1 M. & S. 9.

243. Or if the promise of re-payment had been made for the fraudulent purpose of invalidating his testimony. *Ibid.*

Q. INSURANCE BROKER.

Q. (a) *His rights.*

(And see ante, pl. 105, 6.)

244. A broker who has paid a loss cannot recover it back on the ground that he was not aware that the underwriter had become insolvent. *Edgar* v. *Bumstead*, 1 Campb. 411. Ellenborough, C. J. 1808.

245. Nor after settling an account, receiving the balance, and suffering two years to elapse, can he make a further claim on such ground. *Jameson and another* v. *Swainstone*, 2 Campb. 546, n. Mansfield, C. J. 1809.

246. A broker has no general lien upon a policy effected for a balance due to him from the agent who orders the insurance, though such agent *represent* that he has authority to indorse the bill of lading. *Lanyon* v. *Blanchard*, 2 Campb. 597. Ellenborough, C. J. 1811. See 2 East, 523, 1 Moore, 155.

N. But he has a general lien for a balance due from the assured; *Parker* v. *Carter*, Co. B. L. 567. And see post, LIEN, B. (b.)

247. Where the authority of the broker is countermanded after the slip, but before the policy, is signed, and he pays the premium, he cannot recover the amount from his employer. *Warwick* v. *Slade and another*, 3 Campb. 127. Ellenborough, C. J. 1811.

Q. (b) *Duty and liability of broker.*

248. Brokers ordered to effect a policy "at and from Teneriffe to London," are liable for not inserting liberty "to touch and stay at all or any of the Canary Islands," according to invariable practice. *Mallough* v. *Barber and others*, 4 Campb. 150. Ellenborough, C. J. 1815. Post, pl. 256.

249. No misconduct is imputable to a broker insuring a cargo of wheat with a chartered company, whose policies contain a general exception of particular average, where no directions are given as to the mode of effecting the insurance. *Comber* v. *Anderson, bart. and another*, 1 Campb. 523. Ellenborough, C. J. 1808.

250. Nor where he neglects to abandon; if it be left to his discretion, which he exercises *bonâ fide*. *Ibid.*

251. The owner of goods shipped at A. on board a vessel bound to B. and C., directs an insurance from B. to C.; the broker is liable to an action for negligence, in not stating that the goods were shipped at A. *Park* v. *Hamond*, 4 Campb. 344, Holt, 80. Gibbs, C. J. 1815.

And the court discharged a rule to set aside a verdict. 6 Taunt. 495, 2 Marsh. 189.

252. Semble, that a policy "at and from Gibraltar," will attach, if the ship enter Gibraltar bay. *Ibid.*

253. A broker who retains the policy in his hands, is bound to use reasonable diligence in settling a loss. *Bousfield* v. *Creswell, executor of Whitfield*, 2 Campb. 545. Ellenborough, C. J. 1810.

And see AGENT, pl. 3, 4.

254. A broker who takes credit from an underwriter for a loss, and erases his name from the policy, is absolutely liable to the assured for the amount. *Andrew* v. *Robinson and others*, 3 Campb. 199. Ellenborough, C. J. 1812.

And see *Gaminde* v. *Pigou*, 4 Taunt. 246. *Wilkinson* v. *Clay*, 6 Taunt. 110.

255. But if he merely erase the name without taking credit in his own books, and give notice to the assured, who settles an account with the broker, in which this loss is not included, the assured waves any claim he may have had against the broker. *Ovington* v. *Bell and another*, 3 Campb. 237. Ellenborough, C. J. 1812.

256. A broker cannot be sued for omitting a clause which he was *verbally* directed to insert, but which was not contained in subsequent *written* instructions. *Fomin* v. *Oswell and another*, 3 Campb. 357. Ellenborough, C. J. 1813.

And see ante, pl. 248. EVIDENCE, G. (b).

257. Or for neglecting to insure the full amount ordered, where, from a collateral circumstance, the policy proved to be void. *Ibid.*

258. In an action for premiums, by executors of underwriter against insurance broker, he cannot set off or deduct returns of premium, which accrued after testator's death. *Houston and others, executors of Nicholson*, v. *Robertson*, 4 Campb. 342. Gibbs, C. J. 1815.

259. And where brokers, without a del credere commission, effect policies in their own names, "as agents," they cannot in an action for premiums by the assignees of a bankrupt underwriter, set off a total loss which happened before the bankruptcy, but adjusted, although the policies have always remained in their hands, and they have actually paid the amount of the loss to their principal. *Baker and others, assignees of Gregory, a bankrupt*, v. *Langhorn and others*, 4 Campb. 396. Gibbs, C. J. 1815.

260. Found by verdict that the 12 per cent. deducted by brokers, on the balance of profit paid to underwriters, is a mere gratuity. *Levi and others, executors*, v. *Barnes*, Holt, 412. Dallas, J. 1816.

261. A., a broker, holding a policy of B. on which a loss has happened, states an account with C., an underwriter, including his subscription to this policy, and for the balance due takes a bill of exchange from C. at three months, but without erasing his name from the policy. This bill A. retains, and on the bankruptcy of C., proves as a bebt due to himself. A. is liable to B. for the amount of the subscription. *Wilkinson, assignee of Gwynne*, v. *Clay and others*, 4 Campb. 171. Gibbs, C. J. 1815.

R. FIRE INSURANCES.

(And see ante, pl. 90, 1, 173, 5.)

262. A coffee-house is not an inn, within the meaning of a policy against fire. *Doe* d. *Pitt* v. *Laming*, 4 Campb. 73. Ellenborough, C. J. 1814.

263. Lessee covenants to keep the demised premises insured. He omits to pay the premium until after the expiration of the 15 days of grace, but the premium is subsequently accepted, "as reviving the insurance from the former year." The premises having remained uninsured during the interval between the expiration of the 15 days and the payment of the premium, the covenant is broken. *Doe* d. *Pitt* v. *Shewin*, 3 Campb. 134. Ellenborough, C. J. 1811.

And see 6 East, 571, 2 Smith, 646; 2 Mer. 459; Post, LANDLORD, pl. 34, 35.

N. Qu. whether this revival without a new policy stamp would not be void?

INTEREST OF MONEY.

(For the distinction between usury and interest, see APPENDIX II.)

A. WHERE RECOVERABLE.

(a) *By action.*

(b) *By motion in court of error.*

B. HOW COMPUTED.

(a) *From what time.*

(b) *Compound interest.*

A. WHERE RECOVERABLE.

(And see *Dickinson* v. *Heron*, Sugd. Vend. & Purch. 122. Post, SET OFF, VENDOR AND PURCHASER.)

(a) *By action.*

(Ante, BOND, pl. 11.)

1. An agent who pays the money of his principal into his banker's hands generally, and uses it as his own, is liable for interest. *Rogers, assignees of Stokes,* v. *Edmund Boehm, Henry Nantes, and John Taylor,* 2 Esp. 702. Kenyon, C. J. 1798.

S. P. as to assignees, *Treves* v. *Townsend,* 1 Bro. C. C. 384, executors, *Franklin* v. *Frith,* 3 Bro. C. C. 433, partners, Pothier, Traité du Contrat de Société, chap. 7, num. 116, 9. But see *Adams* v. *Gale,* 2 Atk. 106.

2. Upon a general agreement for retaining tithes, where no day is fixed for the payment of the composition, no interest is due. *Shipley* v. *Hammond,* 5 Esp. 114. Ellenborough, C. J. 1804.

3. But it was said that it would have been otherwise, if a day had been appointed for payment. *Ibid.*

4. So upon a sale of goods, *Chalie* v. *Duke of York,* 6 Esp. 45. Ellenborough, C. J. 1806. But the contrary is now settled. *Gordon and others* v. *Swan and others,* 2 Campb. 429. K. B. T. T. 1810.

S. C. less fully reported, 12 East, 419.

5. Interest is recoverable in four cases only: first, where there is a contract (in writing) to pay money on a day certain. *De Havilland, surviving executor of Bezoil,* v. *Bowerbank,* 1 Campb. 50, Ellenborough, C. J. 1807.

6. So where money is awarded to be paid at a certain day and place, if the demand is made accordingly. *Pinhorn and others* v. *Tuckington,* 3 Campb. 468. Ellenborough, C. J. 1813.

And see 1 East, 400. 1 M. & S. 173. Vin. Abr. Arb. G. 2. post, pl. 19. Secus, of a single bond; *Hogan* v. *Page,* 1 Bos. & Pull. 337.

7. Secondly, where there has been an express promise to pay interest. *De Havilland* v. *Bowerbank, ubi supra.*

8. Thirdly, where from the course of dealing, an intention to allow interest may be inferred. *Ibid.*

9. S. P. *Denton* v. *Rodie,* 3 Campb. 493. Ellenborough, C. J. 1813.

And see post, pl. 13, 28, 29.

10. Fourthly, where interest has been actually made. *Ibid.*

And see *Wills* v. *Commissioners of Appeals,* 5 East, 22. S. C. 1 Smith, 339.

11. Accordingly it is not recoverable in an action for money *had and received,* although a demand of payment may have been made. *Ibid.*

Or *lent, Calton* v. *Bragg,* 15 East, 223.

12. Or upon the balance of an *account stated.* *Chalie* v. *Duke of York,* ubi supra. *Nichol* v. *Thompson,* 1 Campb. 52. Ellenborough, C. J. 1807.

13. Unless interest have been allowed upon former balances. *Ibid.*

And see ante, pl. 8, post, 21, 22, 14 Vin. Abr. Interest, C. 14, *Ashton* v. *Smith.*

14. Or upon a *policy of insurance.* *Kingston* v. *M'Intosh,* 1 Campb. 518. Ellenborough, C. J. 1808.

15. S. P. *dict.* per Le Blanc, J. in *De Bernales* v. *Fuller and others,* 2 Campb. 127. K. B. T. T. 1810.

16. Interest cannot be recovered upon a sum of money paid by a third person into the hands of the defendant, for the plaintiff's use, and by the defendant applied to another purpose. *De Bernales* v. *Fuller and others,* 2 Campb. 426. Ellenborough, C. J. 1810, confirmed in K. B. E. T. 1810.

S. C. upon a former trial between the parties, 14 East, 590, n.

17. And the rule extends to money obtained by fraud or forgery. *Crockford* v. *Winter,* 1 Campb. 129. Ellenborough, C. J. 1807.

18. But where goods are sold to be paid for *by bill*, the purchaser is liable for the interest which the bill, if given, would have carried. *Porter and others* v. *Palsgrave*, 2 Campb. 472. Ellenborough, C. J. 1810.

S. P. *Marshall* v. *Poole*, 13 East, 98.

19. In an action on an award, interest is recoverable from the time of the demand. *Marquis of Anglesea* v. *Chafey*. Abbott, J. Dorchester Spring Assizes, 1818. Ante, pl. 6.

20. So in an action for not accepting goods sold to the defendant to be *paid for by bill at four months*. *Boyce and another* v. *Warburton*, 2 Campb. 480. Ellenborough, C. J. 1810.

And the court of K. B. refused a rule to set aside a verdict in which interest had been included. *Ibid.*

21. A tender of money due on a promissory note, although accompanied with a request to have the note delivered up, is sufficient to stop the running interest. *Dent* v. *Dunn*, 3 Campb. 296. Ellenborough, C. J. 1812. Sed vide *Hume* v. *Peploe*, 8 East, 168.

22. Interest not allowed in an action on a foreign judgment. *Atkinson* v. *Lord Braybrooke*, 4 Campb. 180. 1 Stark. 219. Ellenborough, C. J. 1816.

N. It does not appear from the report whether the judgment was founded on a demand bearing interest.

23. Interest is recoverable on a count stating the loss of the use of deposit on the purchase of an estate to which no title could be made. *De Bernales* v. *Wood*, 3 Campb. 258. Ellenborough, C. J. 1812.

Acc. *Maberley* v. *Robins*, 5 Taunt. 625, 1 Marshall, 258. S. C. Sed vide *Walde* v. *Fort*, 4 Taunt. 334, 341. And see Sugd. V. & P. 428.

A. (b) *By motion in court of error.*

24. And if the purchaser suffer judgment by default in K. B. and bring error in the exchequer chamber, the vendor will be entitled to interest upon the sum for which judgment was finally entered up in K. B. from the service of the allowance of the writ of error until the affirmance. *Becker and another* v. *Jones (in error)* 2 Campb. 428, n. Exchequer Chamber, 1810.

And see *Hilhouse* v. *Davis*, 1 M. & S. 173; *Waters* v. *Rees*, 3 Taunt. 503. Anon. 4 Taunt. 30.

B. How computed.

(And see ante, Bills and Notes, pl. 349. Bond, pl. 14, 15.)

B. (a) *From what time.*

25. The words "bearing interest," carry interest from the date. *Kennerley* v. *Nash*, 1 Stark. 452. Ellenborough, C. J. 1816.

26. Or, "with legal interest on demand." *Hopper* v. *Richmond*, 1 Stark. 507. Ellenborough, C. J. 1816.

B. (b) *Compound interest.*

27. In an action by bankers for money over drawn, the court will allow only simple interest upon the sums actually advanced, not interest upon the balances struck by the plaintiffs at stated times, such balances being partly made up of the interest already incurred. *Dawes and others* v. *Pinner*, 2 Campb. 486, n. Ellenborough, C. J. 1810.

Acc. Ced. 4, 32, 28.

28. Unless interest have been formerly so allowed between the parties. *Bruce and others* v. *Hunter*, 3 Campb. 467. Ellenborough, C. J. 1813.

29. Or the customer know that such is the practice of the house. *Moore* v. *Voughton*, 1 Stark. 487. Ellenborough, C. J. 1816.

And see ante, pl. 8, 9, 13, Bunbury, 11, pl. 65. *Calcot* v. *Walker*, 2 Anstr. 495, Com. Dig. Chancery, 3 S. 3.

JUDGMENT.

(And see Bond, C. Practice, C.)

A. Priority.

1. Judgment recovered against testator, but *not docketed*, may, in a course of administration, be postponed to a bond debt. *Hickey* v. *Hayter*, 1 Esp. 313. Kenyon, C. J. 1795.

The court set aside a nominal verdict for the judgment creditor, 6 T. R. 384.

Nor can such a judgment be pleaded by an executor to an action on *simple*

contract. *Steel* v. *Rorke,* 1 Bos. and Pull. 307.

And see 2 Saund. 7 n. (5). Tidd. 919. *Bothomly* v. *Lord Fairfax,* 1 P. Wms. 334. S. C. 2 Vern. 750.

JURISDICTION.

(And see ante, Courts.)

A. Locality.

1. The court of K. B. cannot take cognizance of offences committed out of the realm, except in cases where jurisdiction is expressly given by statute. *Rex* v. *Munton,* 1 Esp. 62. Kenyon, C. J. 1793.

2. But where a fraud committed in the West Indies, is supported by false returns made to the navy office in London, the jurisdiction of the court attaches. *Ibid.*

S. C. and S. P. 6 East, 590. And see *Rex* v. *Johnson; ibid.* 583.

3. An allegation in a Jamaica judgment by *nil dicit* that the defendant appeared by attorney, is *primâ facie* sufficient, although it do not appear that the attorney was duly appointed, or that the defendant resided within the jurisdiction. *Molony* v. *Gibbons,* 2 Campb. 502. Ellenborough, C. J. 1810.

As to the f[illegible] of the course of the colonial courts, see *Doran* v. *O'Reilly,* 3 Price, 250, 7 Taunt. 244.

JUSTICES OF THE PEACE.

A. Their authority.

(a) *How executed.*

(b) *How contested.*

B. Duty.

C. Privileges.

(a) *By committal for a contempt.*

(b) *By indictment for scandalous words.*

(c) *In actions against them.*

A. Authority of justices.

A. (a) *How executed.*

(And see Appendix, XI.)

1. Where upon the discovery of smuggled goods, the party is not immediately taken into custody, he cannot be afterwards apprehended by virtue of the general authority given to constables by their appointment under the Thames police act, 39 Geo. 3. cap. 87. A special warrant from the magistrates is necessary. *Rex* v. *Lawson and others,* 3 Esp. 262. Kenyon, C. J. 1801.

2. A statute directs that a penalty shall be forthwith paid by the person convicted, and that in case of neglect or refusal to pay or give security, the justice shall, by warrant under his hand and seal, cause the same to be levied by distress and sale; and that it shall be lawful for such justice to order such offender to be detained in safe custody until return may be conveniently made to such warrant. It was held, that an imprisonment under a parol order to detain in custody until the return of such warrant, could not be justified. *Still* v. *Walls and Harris,* 6 Esp. 36. Heath, J. Maidstone, 1806.

But the court of K. B. set aside a verdict for the plaintiff, and ordered a non-suit to be entered; 7 East, 533, and 3 Smith, 513.

3. In drawing up a conviction or order, justices are *bound* to use the form given by the statute. *Goss* v. *Jackson, esq. and Bushell,* 3 Esp. 198. Kenyon, C. J. 1800.

Davison v. *Gill,* 1 East, 64, acc.

A. (b) *How contested.*

4. On a motion to arrest the judgment upon an indictment for disobeying an order of justices for the payment of a fine upon a conviction, the regularity of the conviction cannot be inquired into. *Rex* v. *Mitton,* 3 Esp. 200, n. K. B. T. 1785.

5. Nor in an action of trespass for distraining goods under such conviction. *Goss* v. *Jackson, esq. and Bushell,* 3 Esp. 198. Kenyon, C. J. 1800.

Sed vide *Welsh* v. *Nash,* 8 East, 394.

B. Duty of justices.

6. Where goods are seized and brought to a police office without cause, it is the duty of the magistrates to restore them, and to procure a permit, if necessary. *Price* v. *Messenger, et alt.* 3 Esp, 96, 100. Ellenborough, C. J. 1800.

C. Privileges of justices.

(a) *By committal for a contempt.*

7. *Dub.* whether a magistrate, sitting at his private office, can commit for a contempt. *Pettit* v. *Addington, esq.* Peake, 62. Kenyon, C. J. & K. B. T. T. 1791.

C. (b) *By indictment for scandalous words.*

8. Semble, that an indictment will not lie for words spoken *of* a J. P. in his absence. *Rex* v. *Weltje*, 2 Campb. 142. Ellenborough, C. J. 1809.

Acc. *Rex* v. *Pocock*, 2 Stra. 1157, 8; *Regina* v. *Wrightson*, 2 Salk. 698.

Cont. *Rex* v. *Darby*, 3 Mod. 149; *Rex* v. *Revel*, 1 Stra. 420.

9. And such an indictment clearly cannot be supported, unless it be proved, as well as laid, that the words were spoken of the prosecutor with intention to defame him in his magisterial capacity. *Ibid.*

Acc. *Kent* v. *Pocock*, 2 Stra. 1167.

C. (c) *In actions brought against them.*

10. At the trial for an indictment for theft, the judge orders that the goods shall remain in the custody of the justice who took the information, until it shall appear who is entitled to them. The owner may bring trover for the goods after the expiration of six months, and without giving notice. *Licet and another, assignees, &c.* v. *Reid, esq. and another*, Peake, 35. Kenyon, C. J. 1791.

11. Magistrates are not personally liable for expenses incurred in preparing plans for a county gaol advertised for by the justices at their session, and delivered to a committee appointed to receive them. *Tuck and another, executors of Carter*, v. *Ruggles*, 5 Esp. 237. Mansfield, C. J. 1805.

12. Notice of action against a J. P. under 22 Geo. II. (24 Geo. II. cap. 44.) describing plaintiff's attorney, as of New Inn, *London*, instead of New Inn, *Westminster*, held insufficient for the variance. *Stears* v. *Smith, clerk*, 6 Esp. 138. Ellenborough, C. J. Maidstone, 1810.

And see *Taylor* v. *Fenwick*, 7 T. R. 635, more fully reported, 3 B. & P. 553, (n.) a.

13. Semble, that the notice of action against a magistrate, must be indorsed by an attorney who has taken out his certificate. *Sabin* v. *De Burgh and others*, 2 Campb. 196. Ellenborough, C. J. 1809.

14. But proof that the attorney had ordered his clerk to take out a certificate, and had given him money for that purpose, is sufficient evidence of qualification. *Ibid.*

15. In trespass against J. P. for taking goods, the plaintiff cannot recover more than the value stated in his notice of action. *Stringer* v. *Martyr, esq.* 6 Esp. 134. Macdonald, C. B. Kingston, 1810.

16. And if that sum has been tendered, the plaintiff is not entitled to a verdict. *Ibid.*

17. The notice need not specify the *form* of the intended action. *Sabin* v. *De Burgh, ubi supra.*

A misdescription was ruled to be fatal; but the point was reserved. *Strickland* v. *Ward*, 7 T. R. 631, n.

And see *Massey* v. *Johnson*, 12 East, 67; *Gray* v. *Cookson*, 16 East, 13.

LANDLORD AND TENANT.

(See Witness, C. (i).)

A. Leases.

(a) *When valid.*

(b) *Covenants by lessee.*

B. Rent.

(a) *By whom payable.*

(b) *Double rent.*

(c) *Double value.*

C. TAXES.

D. REPAIRS.

E. NOTICE TO QUIT.

(a) *In what cases necessary.*

(b) *Form of notice.*

(c) *By whom given.*

(d) *To whom given.*

(e) *How directed.*

(f) *How served.*

(g) *At what time to expire.*

(h) *How waved*

(i) *Where evidence of commencement of tenancy.*

A. LEASES.

(And see BILLS AND NOTES, pl. 51. EVIDENCE, G. (b).)

A. (a) *When valid.*

(And see FRAUDS, STATUTE OF, A.)

1. A lease at an entire rent, where part of the lands cannot be legally demised, is void for the whole. *Doe* d. *Griffiths* v. *Lloyd*, 3 Esp. 78. Kenyon, C. J. 1800.

2. Where tenant for life, bound to reserve the best rent, lets the premises on a repairing lease, and after the improvements have taken place, accepts a surrender and grants a fresh term, he must reserve the best rent that can be *then* obtained. *Ibid.*

3. But a court of equity may give relief for that part of the term which remained unexpired at the period of the surrender. *Ibid.*

4. Acceptance of rent by a party entitled to avoid a lease, confirms it. *Doe* d. *T. Jolliffe, J. Jolliffe, and W. Bowerman*, v. *Sybourn*, 2 Esp. 677. Kenyon, C. J. Maidstone, 1798.

S. C. not S. P. 7 T. R. 2.

5. An agreement for a building lease which is to be considered binding till one fully prepared can be produced, operates as a demise, and cannot be received in evidence, unless it be stamped as a *lease*. *Poole* v. *Bentley*, 2 Campb. 286. Ellenborough, C. J. 1809.

And a rule nisi in K. B. to set aside nonsuit was discharged; 12 East, 168.

6. A provision in a lease for an advanced rent, in case the lessee should discontinue purchasing his beer of the lessor, was strongly censured by the court. *Cooper* v. *Twibill*, 3 Campb. 286, n. Ellenborough, C. J. 1808.

7. And a plea in bar to an avowry for such additional rent, stating that the beer supplied was of a bad quality, was considered as a meritorious defence. *Ibid.*

8. But where premises are described in the conditions of sale, as "a free public-house," the bargain may be avoided by the purchaser, if it appear that the lease contains a clause of this nature. *Jones* v. *Edney*, 3 Campb. 285. Ellenborough, C. J. 1812.

9. Although the lease be produced, and read at the auction. *Ibid.*

S. C. not S. P. Sugd. V. & P. 37. And see *Gunnis* v. *Erhart*, 1 H. Bla. 289; *Jenkinson* v. *Pepys*, 6 Ves. 330; *Powell* v. *Edmunds*, 12 East, 6.

A. (b) *Covenants by lessee.*

(And see ante, INSURANCE, 263.)

10. Qu. whether a covenant contained in the assignment of a lease, requiring the assignee and *his assigns* to buy their beer of the assignor, will bind a subsequent assignee. *Hartley* v. *Pehall*, Peake, 131. Kenyon, C. J. 1792.

And see ante, AGREEMENT, pl. 40, 41, 2, 3, 4, 5.

11. A covenant not to alien without leave of lessor, is a *fair* and *usual* covenant. *Morgan* v. *Slaughter*, 1 Esp. 8. Kenyon, C. J. 1793.

S. P. *Folkington* v. *Croft*, 3 Anst. 700. S. P. contra, *Henderson* v. *Hay*, 3 Bro. C. C. 632, recognized by Eldon, C. in *Church* v. *Brown*, 15 Ves. 531; *Brown* v. *Ruban*, 15 Ves. 529.

12. A covenant not to assign or otherwise part with the premises, or any part thereof, for the whole *or any part of the term*, is broken by an *underlease*. *Doe* d. *Holland* v. *Worsley*, 1 Campb. 20. Ellenborough, C. J. 1807.

And see *Crusoe* v. *Bugby*, 2 Bla. 766. S. C. 3 Wils. 234. *Seers* v. *Hind*, 1 Ves. 295.

13. Letting lodgings is not a breach of a covenant not to underlet. *Doe* d. *Pitt* v. *Laming, widow*, 4 Campb. 73. Ellenborough, C. J. 1814.

14. Where lessee covenants to repair generally, and also covenants, within three months after notice, to make the repairs required by such notice, the two clauses are independent; and a notice given under the second covenant, is no waver of a breach of the first. *Roe* d. *Goatly* v. *Paine*, 2 Campb. 520. Ellenborough, C. J. 1810.

15. If after the expiration of a term, the lessee continue to hold, though at an advanced rent, the parties are presumed to have acceded to the terms of the former tenancy, as far as they are applicable to their new situation. *Digby* v. *Atkinson and another*, 4 Campb. 277. Ellenborough, C. J. 1815.

B. RENT.

(And see USE AND OCCUPATION, 11, n.)

B. (a) *By whom payable.*

(And see EXECUTION, A. (e)

16. Where at the expiration of a lease, an under-tenant continues in possession, the original lessee remains liable for the rent, unless the landlord accept the key of the premises, receive rent from the party in possession, or, by some other act, acknowledge him as tenant. *Harding* v. *Crethorn*, 1 Esp. 57. Kenyon, C. J. 1793.

And see *Roe* v. *Wiggs*, 2 N. R. 330; *Pleasant* v. *Benson*, 14 East, 234; 4 Bac. Abr. Leases, I. 3.

17. Where at the expiration of a term, the lessee gives notice to an under-tenant in possession, to pay rent to the lessor; which notice the latter attests with a knowledge of its contents, the first lessee is discharged. *Ibid.*

18. Secus, if the lessor subscribe his name without knowing the contents of the instrument which he attests. *Ibid.*

19. If the tenant abandon the premises without notice, the landlord is not precluded from recovering the subsequent rent, by putting up a bill at the window, and endeavouring to procure another tenant. *Redpath* v. *Roberts*, 3 Esp. 225. Kenyon, C. J. 1800.

20. Acceptance of rent from a third person, is not a ground for presuming a surrender. *Copeland* v. *Watts and another, executors of Gubbins*, 1 Stark. 95. Gibbs, C. J. 1815.

21. A landlord may distrain after an act of bankruptcy. If, therefore, the rent be paid by the bankrupt to avoid a distress which is threatened, the assignees cannot recover the amount from the landlord. *Stevenson et alt. assignees of Knight* v. *Wood*, 5 Esp. 200. Ellenborough, C. J, 1805.

And see ante, EXECUTION, A. (e)

22. Dub. whether an agreement to take a house and to pay rent can be enforced where the premises are consumed by fire before the day appointed for the defendant's entry. *Phillipson* v. *Leigh*, 1 Esp. 398. Kenyon, C. J. 1795.

That it may, see Dyer, 56, a. *Paradise* v. *Jane*, Aleyne, 26; *Monk* v. *Cooper*, 2 Stra. 763. S. C. 2 Lord Raym. 1477; *Belfour* v. *Weston*, 1 T. R. 310; *Doe* v. *Sandham*, *ibid.* 705, 10; *Cutter* v. *Powell*, 6 T. R. 323; *Hare* v. *Groves*, 3 Anstr. 687; 1 Fonbl. 336; 22 Car. II. cap. 11, § 81. 2 Saund. 422; *Baker* v. *Holtpzaffell*, 4 Taunt. 45. S. C. 18 Ves. 116. Contra, *Brown* v. *Quilter*, Ambler, 619; *Steele* v. *Wright*, cited 1 T. R. 708. Pothier, Contrat de Bail à Rente, chap. 6, num. 190, 2. And see *Weigall* v. *Waters*, 6 T. R. 488. S. C. in Equity, 2 Anst. 575. Post, D. pl. 35.

B. (b) *Double rent.*

23. A notice given by the tenant of his intention to quit *as soon as he can get another situation*, is too vague to entitle the landlord to double rent under 11 Geo. II. cap. 19. (sect. 18). *Farrance* v. *Elkington*, 2 Campb. 593. Ellenborough, C. J. 1811.

24. Although the tenant quit the premises, and underlet them. *Ibid.*

B. (c) *Double value.*

(Post, PENAL STATUTE; REPLEVIN.)

25. A tenant who holds over, under a fair claim of right, will not be con-

sidered as *wilfully holding over* within the meaning of 4 Geo. II. cap. 28, s. 1; though it be decided eventually that he has no right. *Wright* v. *Smith*, 5 Esp. 203. Hotham, B. 1805, and Exch. E. 1805.

And see EXECUTORS, pl. 3. post, 36.

26. If, therefore, after the expiration of a term, and after a notice from the landlord to deliver up possession, the tenant hold over and defend an ejectment on a supposition that a renewal of the lease by tenant for life, is valid, an action for the double value will not lie. *Ibid.*

27. Debt for double value will not lie against a tenant *from week to week.* The statute, being *penal*, is to be construed strictly. *Lloyd* v. *Rosbee*, 2 Campb. 453. Ellenborough, C. J. 1810.

Sed vide *Wilkinson* v. *Colley*, 5 Burr. 2694; *Lake* v. *Smith*, 1 N. R. 174, where this seems to have been regarded as a *remedial* statute. And see F. N. B. 60 D, N; Co. Litt. 54, a.

C. TAXES.

(And see post, SET OFF.)

28. In an action for use and occupation, the defendant is entitled to deduct landlord's property tax actually paid. *Baker* v. *Davis*, 3 Campb. 473. Ellenborough, C. J. 1813.

And see *Sapsford* v. *Fletcher*, 4 T. R. 511; *Fuller* v. *Abbott*, 4 Taunt. 105.

29. And it is sufficient to call the collector, who received the amount, without producing the assessment. *Philips* v. *Beer*, 4 Campb. 266. Ellenborough, C. J. 1815.

30. But property-tax not yet paid, cannot be deducted on the ground of the liability of the demised premises. *Pocock* v. *Eustace*, 2 Campb. 181. Ellenborough, C. J. 1809.

And see *Howe* v. *Synge*, 15 East, 448. *Fuller* v. *Abbott*, 4 Taunt. 105.

D. REPAIRS.

31. Tenant from year to year cannot be required to make lasting and substantial repairs. *Ferguson* v. ———, 2 Esp. 590. Kenyon, C. J. 1797.

32. But it was said that he is bound to keep the premises in tenantable condition. *Ibid.*

33. It has since been holden, that he is not liable to general repairs. *Horsfall* v. *Mather*, Holt, 7. Gibbs, C. J. 1815.

Acc. *Gibson* v. *Wells*, 1 N. R. 290. S. C. 2 Smith, 677. *Countess of Shrewsbury's* case, 5 Co. 13. And see Co. Litt. 56, b. (n) 2; 1 Saund. 323, (n) 7: 2 Saund. 252, c. *ibid.* 259. *Herne* v. *Bembow*, 4 Taunt. 764.

34. A stipulation that the tenant shall insure the premises in 600*l.* does not limit his responsibility to that sum under a general covenant to repair. *Digby* v. *Atkinson and another*, 4 Campb. 277. Ellenborough, C. J. 1815.

35. A covenant to keep in repair, binds to re-build after a fire. *Ibid.*

Acc. *Pym* v. *Blackburn*, 3 Ves. 34; *Bullock* v. *Dommitt*, 6 T. R. 650; *Walton* v. *Waterhouse*, 2 Wms. Saund. 420, 422, n. (2). And see ante, pl. 22.

E. NOTICE TO QUIT.

E. (a) *Where necessary.*

36. Where the tenant who came into possession under the devisor refuses to pay rent to the devisees under a contested will, but expresses his readiness to pay to the party entitled to receive it, his refusal does not amount to a disavowal of the title of the devisees so as to entitle them to maintain ejectment without notice. *Doe* d. *Williams* v. *Pasquali*, Peake, 196. Kenyon, C. J. 1793.

And see *Throgmorton* v. *Whelpdale*, Bull. N. P. 96; *Lumley* v. *Hodgson*, 16 East, 99; *Atkyns* v. *Lord Willoughby*, 2 Anst. 397; *Doe* d. *Foster* v. *Williams*, Cowp. 621, 2; F. N. B. 179, K.

37. The acceptance of rent by the remainder-man upon a void lease from tenant for life, creates a tenancy from year to year, and entitles the party to notice. *Doe* d. *Martin* v. *Watts*, 2 Esp. 501. Hotham, B. Guildford, 1796.

And the court of K. B. discharged a rule to set aside nonsuit; 7 T. R. 83.

38. If the attorney of an infant lessor in ejectment make a *bonâ fide* compromise with the defendant, who, in con-

sequence thereof, attorns to such infant lessor, the latter cannot, at full age, bring another ejectment without notice, though he have done no act to confirm the agreement. *Doe* d. *Miller* v. *Noden*, 2 Esp. 530. Kenyon, C. J. 1797.

39. A tenant who holds over after the expiration of his lease, is not entitled to notice, unless the occupation has continued for a year, or rent has been paid. *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717. Kenyon, C. J. 1799.

And see *Whiteacre* v. *Symonds*, 10 East, 13; *Richardson* v. *Langridge*, 4 Taunt. 128.

40. A stranger gets into possession of an empty house without the privity of the owner, and an ineffectual negotiation for a lease afterwards takes place between the parties; the owner may recover the possession in ejectment without giving any notice to quit. *Doe* d. *Knight* v. *Quigley*, 2 Campb. 505. Ellenborough, C. J. 1810.

And see *Right* v. *Bawden and others*, 3 East, 260; *Denn* d. *Brune* v. *Rawlins*, 10 East, 261.

41. Ejectment lies without notice to quit against vendee in possession under proviso that in default of payment of any instalment, vendor shall not be compellable to convey. *Doe* d. *Moore* v. *Lawder*, 1 Stark. 308. Ellenborough, C. J. 1816.

42. Where upon a treaty for the assignment of a term from A. to B. it was agreed that B. should pay the purchase-money on a certain day, that he should in the mean time have possession and pay rent, and that if the purchase-money should not be paid at the day, he should not be entitled to an assignment, it was held, that upon failure of payment, A. might maintain ejectment against B. without notice, or demand of possession. *Doe* d. *Leeson* v. *Sayer*, 3 Campb. 8. Ellenborough, C. J. 1811.

43. Ejectment against co-partner, after dissolution of partnership, for a house agreed to be occupied by the partners, during its continuance, and held, that no notice to quit was necessary. *Doe* d. *Waithman* v. *Miles*, 1 Stark. 181. Ellenborough, C. J. 1816.

E. (b) *Form of notice.*

44. A misdescription of the premises, which cannot mislead the tenant, is immaterial. *Doe* d. *Cox and others* v. ———, 4 Esp. 185. Ellenborough, C. J. 1802.

45. A notice to quit need not be in writing. *Doe* d. *Lord Macartney* v. *J. Crick and W. Crick*, 5 Esp. 196. Ellenborough, C. J. 1805.

46. Though given on behalf of a corporation aggregate. *Roe dem. Dean and Chapter of Rochester* v. *Pierce*, 2 Campb. 96. Macdonald, C. B. Maidstone, 1806.

47. An ejectment may be supported on a notice given by the steward of a corporation aggregate, without shewing that he had a power of attorney for the purpose; the adoption of the notice by bringing the action being a sufficient proof of his authority. *Ibid.*

But see Co. Litt. 245, a. b. 258, a. post, D. (c) 54.

48. Under an agreement between landlord and tenant, "that either party may determine the tenancy by a quarter's notice," such notice must expire at the season of the year when the tenancy commenced. *Doe* d. *Pitcher* v. *Donovan*, 2 Campb. 78. Mansfield, C. J. 1809.

And the court of C. P. set aside a verdict for the landlord; 1 Taunt. 555.

49. Under an agreement by which the tenant "is always to quit at three months' notice," the notice must expire at some quarter-day corresponding with the time of entering. *Kemp* v. *Derrett*, 3 Campb. 510. Ellenborough, C. J. 1814.

50. Where lands and tithes are held under a parol demise at an entire rent, notice to quit the lands only, omitting the tithes, is not sufficient to determine the demise in respect of the lands. *Doe* d. *Morgan* v. *Church*, 3 Campb. 71. Le Blanc, J. Monmouth, 1811.

51. But notice to quit the lands and *premises* will include the tithes. *Ibid.*

E. (c) *By whom given.*

52. A notice to quit in the names of A. and B., where A. only is entitled, is good, and will support an ejectment on the single demise of A. *Doe* d. *T. Jolliffe, J. Jolliffe, and W. Bowerman*, v. *Sybourn*, 2 Esp. 677. Kenyon, C. J. Maidstone, 1798.

53. If executors, who are also devisees in trust, describe themselves as executors instead of trustees, the misdescription is immaterial. *Right* d. *Fisher and others* v. *Cuthell*, 5 Esp. 149. Ellenborough, C. J. 1804.

54. Notice to quit by two of three joint tenants on behalf of the three, is bad, though the third assent afterwards, and join in bringing an ejectment. *Ibid.*

And the court of K. B. discharged a rule for setting aside nonsuit; 5 East, 491.

S. C. differently reported as to the proviso in the lease, 2 Smith, 83, 84, n. Cont. *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120. And see Dye. 23, b. pl. 146. Co. Litt. 245, a. 258, a.

E. (d) *To whom given.*

55. Notice to one of two joint tenants in possession, is sufficient to determine the tenancy as to both. *Doe* d. *Lord Macartney* v. *J. Crick* and *W. Crick*, 5 Esp. 196. Ellenborough, C. J. 1805.

Acc. *Doe* d. *Lord Bradford* v. *Watkins*, 7 East, 551, 3. S. C. 3 Smith, 517. And see Co. Litt. 49, b.

E. (e) *How directed.*

56. A notice to quit served personally on the tenant, need not be directed to him. *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5. Kenyon, C. J. in Easter Term, 1801.

57. And if a notice to quit so served, bear a direction in which the tenant is misnamed, the mistake is immaterial; unless it appear that there is a person whose name answers to the description in the notice, and also that the tenant sent the notice back. *Doe* v. *Spiller*, 6 Esp. 70. Ellenborough, C. J. 1807.

E. (f) *How served.*

58. The delivery of notice at the tenant's house, without proof of its having been explained to a servant, or of its having reached the tenant, is not sufficient. *Doe* d. *Buross and others* v. *Lucas and others*, 5 Esp. 153. Ellenborough, C. J. 1804.

And see *Jones* d. *Griffiths* v. *Marsh*, 4 T. R. 464. Appendix, X.

E. (g) *At what time to expire.*

59. By special custom, a tenant may be entitled to a year's notice to quit. *Roe* d. *Henderson* v. *Charnock*, Peake, 4. Kenyon, C. J. 1790.

And see *Tyley* v. *Seed*, Skinn. 649; *Dethik* v. *Saunders*, 2 Siderf. 20; *Roe* v. *Wilkinson*, Co. Litt. 270, n. 1; 7 Vin. Abr. Customs, H. pl. 11; *Timmins* v. *Rowlison*, 3 Burr. 1603, 9; S. C. 1 Bla. 533.

60. Where by the custom of the country, the holdings are from old Michaelmas, notice to quit at *Michaelmas* generally will be understood to mean *old* Michaelmas. *Furley* d. *Mayor, &c. of Canterbury* v. *Wood*, 1 Esp. 198. Kenyon, C. J. 1794.

S. C. differently reported, Runn. Ejectm. 112. And see *Doe* v. *Lea*, 11 East, 312; post, pl. 74, 75.

61. Notice to quit at the expiration of "the current year of tenancy, which "shall expire next after the end of one "half year from the date hereof," is sufficient. *Doe* d. *Phillips* v. *Butler*, 2 Esp. 589. Kenyon, C. J. 1797.

62. Where a house is taken *by the month*, a month's notice is sufficient. *Doe* d. *Parry* v. *Hazell*, 1 Esp. 94. Kenyon, C. J. 1794.

And see *Doe* v. *Donovan*, 1 Taunt. 555, 7.

63. And a weekly reservation of rent is *primâ facie* evidence of a weekly holding. *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4. Ellenborough, C. J. 1806.

64. But where the parties agree, that if the rent be regularly paid, the tenant shall not be turned out without four weeks' notice, the landlord must prove that default has been made in the payment of the rent, or that such notice has been given. *Ibid.*

65. The unsigned draft of the intended lease may be produced as evidence of such agreement. *Ibid.*

And see *Doe* v. *Bell*, 5 T. R. 471.

66. A quarterly reservation of rent upon a tenancy from year to year, does not dispense with the necessity of a half

year's notice. *Shirley* v. *Newman*, 1 Esp. 266. Kenyon, C. J. 1795.

67. A quarter's notice may however be rendered valid by the acquiescence of the parties. *Ibid.*

68. If the landlord, in the middle of a year, agree to put an end to the tenancy at the next quarter, the agreement is within the statute of frauds, and cannot be enforced if not signed by the parties. *Taylor* v. *Chapman*, 2 Esp. 506, *cited.* Kenyon, C. J. 1795.

69. But if at the end of the year, the landlord accept another tenant, such acceptance will operate as a waver of the notice to quit, and the former tenancy will be determined. *Sparrow* v. *Hawkes*, 2 Esp. 505. Kenyon, C. J. 1796. Supra, 67.

70. Notice on 29th of September to quit on the 25th of March, is a good half-year's notice. *Doe* d. *Harrop* v. *J. Green and G. Green*, 4 Esp. 198. Ellenborough, C. J. 1802.

71. Notice to quit dated 26th September, requiring tenant to deliver up possession on *or about* the end of *six calendar months*, was held sufficient to determine a lady-day holding. *Howard* v. *Wemsley*, 6 Esp. 53. Ellenborough, C. J. 1806.

And see *Right* v. *Darby*, 1 T. R. 159.

72. And semble, that the notice would have been good though "or about" had been omitted; rejecting "calendar" as surplusage, and considering six months equivalent to half a year. *Howard* v. *Wemsley*, *ubi supra.*

And see 1 T. R. 163.

73. Holding commenced on the 21st of November, and the tenant after settling for the fraction of the quarter, continued to pay his rent half yearly at midsummer and christmas. The tenancy is to be computed not from the middle of the quarter, but from the succeeding quarter-day. A notice to quit, therefore, expiring at christmas, is, in such case, sufficient. *Doe* d. *Holcombe* v. *Johnson*, 6 Esp. 10. Ellenborough, C. J. 1806.

74. Where the tenant enters at *michaelmas old style*, a notice to quit at *michaelmas generally*, is sufficient. *Doe* d. *Hinde* v. *Vince*, 2 Campb. 256. Macdonald, C. B. Chelmsford, 1809.

75. S. P. said to have been ruled in *Doe* v. *Brookes*, 2 Campb. 257. Ellenborough, C. J. Hertford, 1809. And Anon. Woodfall. Heath, J. Gloucester, 1800.

And see *Doe* v. *Lea*, 11 East, 312, ante, pl. 60.

76. Upon a letting "for twelve months *certain*, and six months' notice *afterwards*," the tenant is at liberty to quit at the end of the first year, if he give six months' previous notice. *Thompson* v. *Maberly*, 2 Campb. 573. Ellenborough, C. J. 1811.

And see *Sauvage* v. *Dupuis*, 3 Taunt. 410.

E. (h) *How waved.*

77. The acceptance by lessor's agent, of rent due at michaelmas, is *primâ facie* a waver of a notice to quit at midsummer. *Doe* d. *Ash* v. *Calvert*, 2 Campb. 387. Ellenborough, C. J. 1810.

And see *Doe* v. *Batten*, Cowp. 243; *Goodright* v. *Cordwent*, 6 T. R. 219; F. N. B. 144, O; *ib.* 179, F. note, (c).

78. But if the agent was not apprized of the steps taken to determine the tenancy, and had no special authority to receive the particular rent, the notice remains in force. *Ibid.*

And see Y. B. 4 H. 6, 21, a. per Cottesmore; F. N. B. 179, A. note, (c).

79. If, after the determination of a tenancy by notice, the landlord give another notice to quit in 14 days, or pay double value, the second notice is no waver of the first. *Doe* d. *Digby* v. *Steel*, 3 Campb. 117. Ellenborough, C. J. 1811.

Acc. *Messenger* v. *Armstrong*, 1 T. R. 53; *Doe* v. *Humphreys*, 2 East, 237. And see *Doe* v. *Palmer*, 16 East, 53.

E. (i) *Where evidence of commencement of tenancy.*

80. It was held, that a notice "to quit on the 25th day of March or the 5th day of April next ensuing," served on the 29th of September, was *primâ facie* sufficient to entitle the landlord to recover in ejectment; and that it lay upon the defendant to prove that his tenancy commenced at neither of those periods. *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5. Kenyon, C. J. 1801.

81. A notice to quit expiring at midsummer, was held not to be *primâ facie* evidence of a midsummer holding. *Doe* d. *Ash and another* v. *Calvert*, 2 Campb. 388. Ellenborough, C. J. 1810.

82. If the tenant, even undesignedly, misinform his landlord respecting the commencement of the holding, he is bound by a notice given in consequence of his mis-statement. *Doe* d. *Eyre et alt.* v. *Lambly*, 2 Esp. 635. Kenyon, C. J. 1798.

83. Notice was given on the 22d of March to quit at the expiration of the current year, and in January following a declaration of ejectment, laying the demise in November, was served on the tenant, who making no objection said, he would go out as soon as he could suit himself. Held, that this was evidence of a michaelmas holding to go to the jury. *Doe* d. *Baker* v. *Wombwell*, 2 Campb. 559. Ellenborough, C. J. 1811.

84. The tenant reads the notice in the presence of the person who serves it, and makes no objection. This is *primâ facie* evidence that the tenancy commenced at the time of the year at which the notice to quit expires. *Thomas* d. *Jones et ux.* v. *Thomas*, 2 Campb. 647. Lawrence, J. Hereford, 1811.

And the court of K. B. refused a rule to set aside a verdict for the plaintiff. *Ibid.*

And see *Doe* d. *Clarges* v. *Forster*, 13 East, 405, where it was held to be no ground for granting a new trial, that the witness had not been questioned as to the circumstance of the reading of the notice by the tenant.

LEGACY.

1. No action at law lies to enforce the payment of a pecuniary legacy. *Farish* v. *Wilson*, Peake, 73. Kenyon, C. J. 1791.

S. P. *Nicholson* v. *Sherman*, 1 Sidərf. 45, 6. S. C. T. Raym. 23, 4; *Deeks* v. *Strutt*, 5 T. R. 690; *Mayor of Southampton* v. *Greaves*, 8 T. R. 590, 3. And see *Palmer* v. *Waddington*, 3 Leon. 129.

2. Secus, of a *specific* legacy after assent. *Doe* d. *Lord Say and Sele* v. *Guy, executor*, 4 Esp. 154. Ellenborough, C. J. 1802.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 3 East, 120.

3. A legacy to a creditor is no satisfaction of a debt which accrues after the making of the will. *Lesage* v. *Coussmaker and others, executors*, 1 Esp. 187. Kenyon, C. J. 1794.

S. P. *Cranmer's* case, 2 Salk. 508. *Chancey's* case, 1 P. Wms. 408, 9; *Thomas* v. *Bennett*, 2 P. Wms. 341, 3; *Fowler* v. *Fowler*, 3 P. Wms. 353, 5.

4. Or of a demand at that time unliquidated. *Ibid.*

S. P. *Rawlins* v. *Powell*, 1 P. Wms. 298, 9. And see *Carr* v. *Eastabrooke*, 3 Ves. 561.

5. Executors cannot be charged with a service performed for the testator in expectation of a legacy. *Ibid.*

S. P. *Osborn* v. *Governor of Guy's Hospital*, 2 Stra. 728.

LIBEL.

A. CIVIL ACTION.
- (a) *In what cases maintainable.*
- (b) *Pleadings.*
- (c) *Evidence.*

B. CRIMINAL PROSECUTION.
- (a) *By information.*
- (b) *By indictment.*
- (c) *Pleadings.*
- (d) *Evidence.*

A. CIVIL ACTION.

(And see DEFAMATION.)

A. (a) *In what cases maintainable.*

1. A. cannot maintain an action against B. for a libel upon C., whereby C. was deterred from singing at A.'s theatre, to the diminution of his profits. *Ashley* v.

Harrison, Peake, 194, and 1 Esp. 48. Kenyon, C. J. 1793.

2. Fair and candid observations on performances at a place of public entertainment, are not libellous. *Dibdin* v. *Swan and Bostock*, 1 Esp. 28. Kenyon, C. J. 1793.

3. But where the comment is unjust and malevolent, an action will lie. *Ibid.*

S. P. *Nightingale* v. *Stockdale*, Selw. 933, h.

4. A paragraph in one newspaper charging another with scurrility, is not actionable. *Heriot* v. *Stuart*, 1 Esp. 437. Kenyon, C. J. 1796.

5. Secus, where it contains an assertion that such newspaper is low in circulation. *Ibid.*

6. A correct and *bonâ fide* statement of what passes in a court of justice, is not actionable. *Curry* v. *Walter*, 1 Esp. 457. Eyre, C. J. 1795.

And see *Rex* v. *Wright*, 8 T. R. 293; *Carr* v. *Jones*, 3 Smith, 491, 503. S. C. by the name of *Stiles* v. *Nokes*, 7 East, 493, 503.

7. And it was ruled that the justification might be given in evidence under the general issue. *Ibid.*

But the court of C. P. inclined to think that the facts should have appeared on the record; 1 Bos. and Pull. 525.

8. If a letter is written ostensibly for the purpose of inquiring a servant's character, but in reality with a view to entrap the master into the writing of a libel, the servant cannot maintain an action upon the answer. *King* v. *Waring et ux.* 5 Esp. 13. Alvanley, C. J. 1803.

9. A person cannot sue for general damages for words affecting him in his trade, unless he be a trader within the meaning of the bankrupt laws. *Clark* v. *Wisdom*, 5 Esp. 147. Ellenborough, C. J. 1804.

Contra, *Dobson* v. *Thornistone*, 3 Mod. 112: *Chapman* v. *Lamphire*, *ibid.* 155. 3 Salk. 326, 7.

10. But if upon the pleadings it be doubtful whether the trade is within the statutes or not, it may be shewn to have been so carried on as to make the party liable to a commission. *Ibid.*

11. No action will lie against the president of a court martial, for publishing in the usual form, the sentence, in which, after stating that the prisoner is honourably acquitted, it is declared, that the charges are groundless and malicious, and that the conduct of the prosecutor is highly injurious to the service. *Jekyll* v. *Sir John Moore*, 6 Esp. 63. Mansfield, C. J. 1806.

And the court of C. P. refused a rule to set aside nonsuit; 2 N. R. 341.

And see *Warden* v. *Bailey*, 4 Taunt. 67, 70.

12. An action for a libel cannot be maintained against A., the writer of a confidential letter to B., in which he charges the plaintiff with improper conduct in the management of business in which A. and B. were jointly concerned. *M'Dougall, one, &c.* v. *Claridge, one, &c.* 1 Campb. 267. Ellenborough, C. J. 1808.

13. Nor can the owner of a public-house, maintain an action against a neighbouring publican for giving a bad character of such house to a person, who, being in treaty for purchasing it, applied to the defendant for information, provided there is some evidence, though slight, of the truth of the assertion. *Hamber* v. *Minge*. Abbott, C. J. Westminster, 13th February, 1819.

14. And the defendant need not justify. *Ibid.*

15. The delivery of a libel by a Provincial Governor to his Attorney General for his *private* perusal, is a publication. *Wyatt* v. *Gore*, Holt, 299. Gibbs, C. J. 1816.

16. A. is surety for B., to C.; C. is justified in stating to A. any opinion which he may *bonâ fide* have formed of B.'s conduct, however intemperate and unfounded his representations. *Dunman* v. *Bigg*, 1 Campb. 269. n. Ellenborough, C. J. 1808.

17. It is actionable to impute to a bookseller the publication of a silly poem, fabricated by the defendant as a specimen of the plaintiff's productions. *Ibid.*

18. It is not actionable to ridicule, and caricature an author with reference merely to his *literary* character. *Sir John Carr, knight*, v. *Hood and another*, 1 Campb. 355, n. Ellenborough, C. J. 1808.

19. Words may be actionable as well as indictable when reduced into writing,

for the mere speaking of which no action would have lain. *Earl of Leicester* v. *Walter*, 2 Campb. 251. Mansfield, C. J. 1809. 3 Campb. 214, Exchequer Chamber, 1811.

A. (b) *Pleadings.*

20. It was ruled, that under the general issue the defendant might shew that the supposed libel was a correct statement of what had passed in a court of justice. *Curry* v. *Walter*, 1 Esp. 457. Eyre, C. J. 1795.

But the court of C. P. doubted whether the defendant should not have justified; and no judgment was given; 1 Bos. and Pull. 525.

21. A count for a libel may be joined with a count for verbal slander. *King* v. *Waring et ux.* 5 Esp. 13. Alvanley, C. J. 1803.

And see *Manning* v. *Fitzherbert*, Cro. Car. 271.

22. In an action for a libel, charging the plaintiff with having published immoral books, the defendant may, under the general issue, produce other publications of the plaintiff's, to shew that the supposed libel is a fair stricture on his publications. *Tabart* v. *Tipper*, 1 Campb. 350. Ellenborough, C. J. 1808.

And see *Sidnam* v. *Mayo*, 1 Roll. Rep. 427, S. C. Cro. Jac. 407.

23. Where separate passages of a libel are set out in the declaration, they should be described as forming distinct parts. *Tabart* v. *Tipper*, 1 Campb. 352. Ellenborough, C. J. 1808.

24. But when the passages are not distinguished, if the intervening words do not affect the sense, the omission is immaterial. *Ibid.*

A. (c) *Evidence.*

25. Ruled, that words actionable in themselves cannot be given in evidence to shew the malicious intention with which the words charged in the declaration were spoken. *Cook* v. *Field*, 3 Esp. 133. Kenyon, C. J. 1788.

26. In an action for slander, any words spoken by the defendant, *which are not in themselves actionable*, may be given in evidence to shew the malice of the defendant. *Mead* v. *Daubigny*, Peake, 125. Kenyon, C. J. 1792.

27. But it was afterwards held, that after proof of the libel laid in the declaration, other libels not charged might be given in evidence. *Lee* v. *Huson*, Peake, 166. Kenyon, C. J. 1792.

28. So in an action for verbal slander; but the jury will be directed to give damages only for the words laid in the declaration. *Rustell* v. *Macquister*, 1 Campb. 49, n. Ellenborough, C. J. 1807.

29. In an action for words of perjury, an indictment subsequently preferred by the defendant against the plaintiff, is evidence to shew *quo animo* the words were spoken. *Tate* v. *Humphreys*, 2 Campb. 73, n. Graham, B. Hereford, 1808.

30. But in an action for a libel, other libels published by the defendant cannot be received to shew the malicious motive, unless they expressly refer to the libel declared on. *Finnerty* v. *Tipper*, 2 Campb. 72. Mansfield, C. J. 1809.

31. Where the damage laid is, that the manager of a theatre lost the profits of several performances, a witness may be asked generally whether the receipts of the house have diminished, but not whether several persons have not given up their boxes. *Ashley* v. *Harrison*, 1 Esp. 48. Kenyon, C. J. 1793.

32. Where a defendant obtains a verdict upon a justification of words of felony, the plaintiff may be put upon his trial without the intervention of a grand jury. *Cook* v. *Field*, *ubi supra.*

33. A defendant is not precluded from proving a justification of words of felony, by the previous acquittal of the plaintiff. *England* v. *Bourke*, 3 Esp. 80. Kenyon, C. J. 1800.

34. Where the words charge the plaintiff with being accessary to a felony, the defendant is not concluded by the acquittal of the principal felon. *Ibid.*

And see ante, FELONY.

35. In an action by a servant against his master for writing a character charging him with dishonesty and misconduct, evidence of the antecedent general good

conduct of the plaintiff, is admissible. *King* v. *Waring et ux.* 5 Esp. 13. Alvanley, C. J. 1803.

36. To support an *action*, the libel must be shewn to have been delivered to a third person; a delivery to the plaintiff is not sufficient. *Phillips, gent.* v. *Jansen*, 2 Esp. 624. Kenyon, C. J. 1794.

And see *Edwards and Watton's* case, 4 Leon. 240; *Barrow* v. *Lewellin*, Hob. 62; *Hicks's* case, *ibid.* 215.

37. The shewing of a caricature to a person *at his request*, is not a sufficient publication. *Smith* v. *Wood*, 3 Campb. 323. Ellenborough, C. J. 1813.

38. In an action for a libel, proof that the plaintiff has been in the habit of libelling the defendant, is no bar to the action; *Finnerty* v. *Tipper*, 2 Campb. 76. Mansfield, C. J. 1809. But it will materially affect the amount of damages. *Ibid.*

B. Criminal prosecution.

B. (a) *By information.*

39. If a member of parliament publish a speech in a newspaper, containing slanderous charges, an information for a libel may be supported. *The King, on the prosecution of Sermon*, v. *Lord Abingdon*, 1 Esp. 226. Kenyon, C. J. 1794.

And see *Rex* v. *Bate*, Dougl. 387.

40. An information will lie for publishing an invective unconnected with argument, against a judge and jury, for acquitting a prisoner. *Rex* v. *White*, 1 Campb. 359, n. Grose, J. 1808.

And see *Rex* v. *Watson*, 2 T. R. 199.

41. It is not libellous to express regret that the sovereign has taken an erroneous view of foreign and domestic policy. *Rex* v. *Lambert and Perry*, 2 Campb. 398. Ellenborough, C. J. 1810.

B. (b) *By indictment.*

42. The proprietor of a newspaper is responsible criminally as well as civilly for the publication of a libel inserted without his privity. *Rex* v. *Walter*, 3 Esp. 21. Kenyon, C. J. 1799.

43. An advertisement in a newspaper, whereby A. requests to be informed whether B, has been guilty of a transportable felony, is not a libel, if A., or his employer, be interested in the discovery, and the inquiry be made *bonâ fide*. *Delany* v. *Jones*, 4 Esp. 191. Ellenborough, C. J. 1802.

44. The publication of *ex parte* examinations, taken before a magistrate on a charge of felony, is libellous though the statement be correct. *Rex* v. *Lee and another*, 5 Esp. 123, Heath, J. Horsham, 1804.

45. Especially where the writer assumes that the party is guilty. *Rex* v. *Fisher and others*, 2 Campb. 563. Ellenborough, C. J. 1811.

And see *Carr* v. *Jones*, 3 Smith, 491. S. C. under the names of *Stiles* v. *Nokes*, 7 East, 493.

46. It is a misdemeanour to copy an *ext-ajudicial* affidavit, containing libellous matter, for the purpose of presenting it to the magistrate to be sworn, though such copy be made by the magistrate's clerk, and by his command. *Maloney* v. *Bartley*, 3 Campb. 210. Wood, B. Gloucester, 1812.

Sed vide *Lambe's* case, Moore, 813, 4th resolution; S. C. 9 Co. 59. And see *Rex* v. *Bear*, 2 Salk. 417. S. C. 5 Mod. 167.

B. (c) *Pleadings.*

47. If a libellous letter refer to a newspaper as to its authority, the newspaper may be read in evidence to shew that the defendant was not the inventor of the slander, in mitigation of damages. *Mullett* v. *Hulton*, 4 Esp. 248. Ellenborough, C. J. 1803.

48. But such a reference will not entitle the defendant to go into evidence of the truth of the charge. *Ibid.*

49. An indictment for a libel on the treasurer of the parish of Greenwich, contained (unnecessarily) an averment, that he was *duly* appointed treasurer. Held, that an entry in the vestry book, stating, that the prosecutor was elected at a vestry duly held in pursuance of notice, was evidence that notice had been given, without which, by a particular statute, the election would have been void. *Rex* v. *Martin*, 2 Campb. 100. Macdonald, C. B. Maidstone, 1809.

And see *Cox* v. *Copping*, 5 Mod. 395. 2 Stra. 1223, n. *Rex* v. *Mothersill*, 1 Stra. 93. S. C. 12 Vin. Abr. 30, pl. 16.

50. Under the general issue, the defendant may prove, in mitigation of damages, that at the time the libel was published, there was a general suspicion that the plaintiff was guilty of the practices imputed to him, and that his relations and acquaintances had ceased to visit him. *Earl of Leicester* v. *Walter*, 2 Campb. 251. Mansfield, C. J. 1809.

S. P. ——— v. *Moor*, 1 M. & S. 284.

51. A defendant may be acquitted of *printing*, and found guilty of *publishing* a libel. *The King* v. *Williams*, 2 Campb. 646. Lawrence, J. Hereford, 1811.

52. And where the record varies from the printed libel, but agrees with the manuscript delivered by the defendant to the printer, he may be found guilty of the *publishing* only. *Ibid.*

53. So if the libel be contained in a newspaper, the prosecutor may rest his case upon the proof of *publication* pointed out by 38 Geo. III. cap. 78. s. 14. and 17. leaving the defendant to be acquitted of composing and publishing. *The King* v. *Hunt and another*, 2 Campb. 583. Ellenborough, C. J. 1811.

And see *Rex* v. *Hart*, 10 East, 94.

B. (d) *Evidence.*

54. To corroborate the testimony of a person called to prove that the defendant was the author of a particular libel, other compositions of the defendant on the same subject, may be produced. *The King* v. *Pearce*, Peake, 75. Kenyon, C. J. 1791.

55. The copy of a newspaper may be given in evidence without a stamp. *Ibid.*

56. The publication of a newspaper is sufficiently proved by a witness who states it to have been published in the usual way, without producing a copy which has been actually published. *Ibid.*

57. Delivery of the libel to the party libelled, is a sufficient publication to support an *indictment*. *Phillips, gent.* v. *Jansen*, 2 Esp. 624. Kenyon, C. J. 1798.

S. P. *Edwards and Watton's* case, 4 Leon, 240. *Barrow* v. *Lewellin*, Hob. 62. *Hicks's* case, *ibid.* 215.

58. After proof of the publication of a paper, called "Cobbett's Political Register," containing a libel on the plaintiff, the witness was permitted to be asked, whether he had since purchased other papers of the same title at the same office, for the purpose of shewing that the first paper was circulated regularly and deliberately. *Plunkett* v. *Cobbett*, 5 Esp. 136. Ellenborough, C. J. 1804.

S. C. Selw. 986, n. 988.

59. The production of a libellous letter with the Islington post-mark, is not presumptive evidence of a publication in Middlesex. *Rex* v. *Watson*, 1 Campb. 215. Ellenborough, C. J. 1808.

Sed vide ante, INSURANCE, P. (a). pl. 236. Post, USURY, D. *Rex* v. *Johnson*, 7 East, 65. S. C. 3 Smith, 94. 4 Harg. State Trials, 353.

60. If a libellous letter, addressed to the prosecutor in the county of A., be forwarded by the post, and delivered to him in the county of B., this is a sufficient publication in the latter county. *Ibid.*

And see *Rex* v. *Johnson*, 7 East, 65. S. C. 3 Smith, 94.

61. Or in the former. *Rex* v. *Williams*, 2 Campb. 507. Ellenborough, C. J. 1810.

62. Where the supposed libel is contained in a newspaper, the defendant has a right to have read in evidence extracts from a different part of the same paper connected with the subject of the libellous passage. *Rex* v. *Lambert and Perry*, 2 Campb. 398. Ellenborough, C. J. 1810.

63. At the trial, the defendant was allowed, after objection taken, to shew that he had stopped the sale of the libellous publication, with a view to mitigation of the punishment and to avoid the expense of bringing the fact before the court by affidavit. *Rex* v. *Hone*. Ellenborough, C. J. Guildhall Sittings after H. T. 1817.

LICENCE.

(Ante ALIEN, pl. 5, 6. EVIDENCE, H. (a) 229. INSURANCE, B. (b). L. (a). *Ibid.* pl. 7, 15, 17, 18, 19, 20, 3, 4, 5, 6.) Post, SHIP, G.

---

1. Where defendant merely takes issue upon the breaches assigned in a declaration in covenant, he cannot give licence in evidence. *Ratcliff* v. *Pemberton*, 1 Esp. 35. Kenyon, C. J. 1793.

N. In the report of this case it is stated, that the defendant pleaded the *general issue;* and therefore in Mr. Selwyn's valuable Nisi Prius Abridgment, p. 505, the defendant is supposed to have merely pleaded *non est factum;* but from the nature of the plaintiff's evidence, and from the language of the chief justice, it is conceived that the point must have arisen in the manner above stated.

And see post, PLEADING, A. (c); E. (a).

LIEN.

A. PARTICULAR.

(a) *Where created.*

(b) *Promise in respect of.*

(c) *Lien, where waved.*

B. GENERAL.

A. PARTICULAR LIEN

A. (a) *Where created.*

(And see ante, CARRIER, pl. 13.)

1. A party obliged to receive goods, has a lien on them by the common law. *Naylor* v. *Mangles et alt.* 1 Esp. 109. Kenyon, C. J. 1794.

S. P. *Yorke* v. *Grindstone*, 1 Salk. 388, and *Yorke* v. *Grenaugh*, 2 Lord Raymond, 866, 7. Sed vide *Brenan* v. *Currant*, Selw. 1277, n; S. C, Say. Rep. 225.

2. But goods which are not booked, and which the consignee is ready to receive from the waggon, cannot be detained for a charge for booking or warehouse room. *Lambert* v. *Robinson*, 1 Esp. 119. Eyre, C. J. 1793.

3. Depositing all, or even part of the deeds relating to a real estate, implies an intention to charge the property. *Richards* v. *Borrett*, 3 Esp. 102. Kenyon, C. J. 1800.

Acc. Langston, *ex parte*, 17 Ves. 227. S. C. 1 Rose, 26. And see *Russell* v. *Russell*, 1 Bro. C. C. 269. Wetherell, *ex parte*, 11 Ves. 398, 401. Haigh, *ex parte*, *ibid.* 404. Finden, *ex parte*, *ibid.* 405. Mountford, *ex parte*, 14 Ves. 606. Payler, *ex parte*, 16 Ves. 434. *Roberts* v. *Clayton*, 3 Anst. 716.

4. A., to whom sugars are consigned for sale, deposits them with B., a broker, who advances money and accepts bills for A. B. may retain the sugars against C., the owner, unless the latter will repay the advances, and give a full indemnity against the acceptances. *Pultney, bart.* v. *Keymer et alt.* 3 Esp. 182. Kenyon, C. J. 1800.

And see *Hammond* v. *Barclay*, 2 East, 227, 35.

5. And B. is not bound to take the counter acceptances of C. as an indemnity. *Pultney* v. *Keymer, ubi supra.*

6. Semble, that a shipwright has a lien on a ship, taken into his dock, for the repairs. *Raitt* v. *Mitchell and another*, 4 Campb. 146. Ellenborough, C. J. 1815.

7. But he has no lien where, by the usage of trade, credit is given to the owner. Although the period of credit vary according to the nature of the employment. *Ibid.*

8. A captain, who has rendered himself personally liable on account of his ship, has a lien upon the freight for his disbursements. *White* v. *Baring et alt.* 4 Esp. 22. Kenyon, C. J. 1801.

9. And he may recover from a consignee, who pays the freight to the owner, after notice of the captain's claim. *Ibid.*

Contra, *Hussey* v. *Christie*, 9 East, 426. S. C. 13 Ves 594, 600.

And see ante, INSURANCE, pl. 27.

10. The master of a vessel has a lien upon the luggage of a passenger for the

passage money, whether the price have been settled between the parties or not. *Wolf* v. *Summers*, 2 Campb. 631. Lawrence, J. 1811.

And see Abbott's Law of Shipping, part III. cap. 3. s. 11.

11. But he has no right to detain the person of the passenger, or clothes which he is actually wearing. *Ibid.*

12. A. being under acceptances for B., the latter executes a power of attorney, authorizing A. to receive money due to him, and to hold it as a security. A. cannot retain money received under the power after the bankruptcy of B. *Hovill, assignee*, v. *Lethwaite*, 5 Esp. 158. Ellenborough, C. J. 1804.

But see *Row* v. *Dawson*, 1 Vez. 331; *Yeates* v. *Grove*, 1 Ves. 280. And see ante, AGENT, pl. 68.

13. Possession obtained by a misrepresentation, will not support a lien. *Madden* v. *Kempster*, 1 Campb. 12. Ellenborough, C. J. 1807.

S. P. *Griffiths* v. *Hyde*, Selw. 1281. And see 1 Vent. 46.

But see *Whitehead* v. *Vaughan*, Co. B. L. 566.

14. An accommodation acceptor may retain money of the drawer, which comes fairly into his hands, until the bill is delivered up, or he receives sufficient indemnity. *Madden* v. *Kempster*, *ubi supra*.

S. P. per Lawrence, J. in *Clarke* v. *Cock*, 4 East, 57, 73. S. P. Metcalf, *ex parte*, 11 Ves. 407. And see *Hammond* v. *Barclay*, 2 East, 227; *Walker* v. *Birch*, 6 T. R. 258. LIMITATION, 8.

15. A banker, whilst his house is solvent, sells out J. B.'s stock, and applies the proceeds to the purposes of the firm. On the same day, he deposits amongst the securities belonging to customers, certain bonds, with a memorandum stating that the house have borrowed from J. B. 16,000*l.* stock, which they undertake to replace, and that they have deposited these bonds as a collateral security, to be assigned when required. The packet containing the bonds is indorsed "the property of "J. B." J. B. has no intimation of this appropriation till he receives the packet, with a note informing him that the house will be obliged to suspend its payments on the morrow. J. B. cannot retain the bonds against the assignees. *Wilson and others* v. *Balfour*, 2 Campb. 579. Ellenborough, C. J. 1811.

16. The vendee of a term accepts bills for part of the purchase money; the lease and assignment are deposited with a third person as a collateral security, to be delivered up to the purchaser on payment of the bills. The vendor getting possession of the lease from the depositary, pledges it with persons who *bonâ fide* advance money upon it, and to whom he indorses the bills. The pawnees have no lien on the lease beyond the amount of these bills. *Hooper and others, assignees of Wells a bankrupt*, v. *Ramsbottom and others*, 4 Campb. 121. Gibbs, C. J. 1814.

17. The question whether J. S. had at a particular time any lien on certain goods or their produce, must be found in the negative, if J. S., though equitably interested in the latter, was never in possession of either. *Heywood and others, assignees of Humble, a bankrupt, and Gladstone and others, assignees of Holland, a bankrupt*, v. *Waring and another, assignees of Holmes, a bankrupt*, 4 Campb. 291. Ellenborough, C. J. 1815.

18. A factor obtaining the certificate of registry from the master, for the express purpose of paying the duties, cannot detain it for a balance owing to him by the ship-owner. *Burn and another, assignees of Bone*, v. *Brown and another*, 2 Stark. 272. Bayley, J. 1817.

19. Or even for the amount of such duties. *Ibid.*

And see *Gladstone* v. *Birley*, 2 Meriv. 401; *Houlditch* v. *Desanges*, 3 M. & S. 205; infra, pl. 22.

A. (b) *Promise in respect of.*

20. A parol promise to pay the debt of a third person, in consideration of the creditor's giving up property upon which he has a lien, is binding. *Houlditch et alt.* v. *Milne*, 3 Esp. 86. Eldon, C. J. 1800.

Acc. *Castling* v. *Aubert*, 2 East, 325.

And the court of K. B. refused a rule for a new trial. *Ibid.*

And see *Alderson* v. *Temple*, 1 Bla. 660; S. C. 4 Burr. 2235; *Glynn* v.

Baker, 13 East, 509; Co. B. L. 168; Ante, BANKRUPT, G. (c).

A. (c) *Where waved.*

21. If a person, without mentioning his lien, claim to retain goods on a different ground, the lien is waved. *Boardman* v. *Sill*, 1 Campb. 410, n. Ellenborough, C. J. 1808.

Acc. *Martini* v. *Coles*, 1 M. & S. 147, 8. *Parry* v. *Dawson*, 3 Anst. 712.

22. A. builds a carriage for B., and obtains a verdict for goods *bargained and sold*. Until actual payment A. has a lien on the carriage remaining in his possession. *Houlditch and another* v. *Desanges and another*, 2 Stark. 337. Ellenborough, C. J. 1818.

23. Secus, if A. had recovered in an action for goods sold and *delivered*; comme semble. *Ibid.*

24. A coachmaker permitting the owner to take away and use a carriage after it has been repaired, loses his lien for the repairs, and cannot detain it when afterwards left in his charge. *Hartley* v. *Hitchcock*, 1 Stark. 408. Ellenborough, C. J. 1816.

B. GENERAL LIEN.

(And see ante, INSURANCE, Q. (a) pl. 246.)

25. *Bankers* have a general lien for the balance of their account. *Jourdaine, assignee of Nowlan*, v. *Lefevre and others*, 1 Esp. 66. Kenyon, C. J. 1793.

S. P. *Davis* v. *Bowsher*, 5 T. R. 488. *Scott* v. *Franklin*, 15 East, 428.

26. So *wharfingers*. *Naylor* v. *Mangles, et alt.* *Ib.* 109. Kenyon, C. J. 1794.

27. S. P. ruled in *Spears* v. *Hartly*, 3 Esp. 81. Eldon, C. J. 1800.

And see *Rushforth* v. *Hadfield*, 6 East, 519, 22, and 7 East, 224. S. C. 2 Smith, 631, 7, and 3 Smith, 221. *Kirkman* v. *Shawcross*, 6 T. R. 14.

28. And *dyers*. *Savill* v. *Barchard et alt.* 4 Esp. 53. Kenyon, C. J. 1801.

S. P. *Humphreys* v. *Partridge*, 4 Mont. B. L. 18, n. a. *Rushfield* v. *Hadfield*, 6 East, 523, arg. Sed vide *Green* v. *Farmer*, 4 Burr. 2114, 21. S. C. 1 Bla. 651. *Close* v. *Waterhouse*, 6 East, 523, n. Acc. *Brown* v. *Litton*, 1 P. Wms. 141.

29. And *calico printers*. *Weldon* v. *Gould*, 3 Esp. 268. Kenyon, C. J. 1801.

S. P. *Ex parte* Andrews, Co. B. L. 429.

30. But such *general* balance must be made up of work done in the course of the particular business; and no lien can be claimed in respect of money lent, or other collateral matter. *Ibid.*

N. Nor can the owner of a chartered vessel detain the goods of the freighter for *dead freight*. *Phillips* v. *Rodie*, 15 East, 553, 4, 5. And see 3 Bos. & Pul. 488, per Chambre, J. *Birley* v. *Gladstone*, 3 M. & S. 205; 2 Merw. 401.

31. If A. deliver calicoes to B. to be printed, and B. employ C. to print them, C. may retain the goods against a debt owing to him from B. *Ibid.*

And see *Richardson* v. *Goss*, 3 Bos. & Pull. 119.

32. A. effects an insurance in his own name with B., but informs him that the property belongs to a correspondent in the country. Upon the bankruptcy of A., B. will not have any lien upon the policy for a general balance due from A. *Snook and another* v. *Davidson and another*, 2 Campb. 218. Ellenborough, C. J. 1809.

S. P. *Maanss* v. *Henderson*, 1 East, 335. And see *Man* v. *Shiffner*, 2 East, 523.

33. An insurance broker has no general lien upon a policy effected for a balance due to him from the agent who orders the insurance; though such agent represent that he has authority to indorse the bill of lading. *Lanyon* v. *Blanchard*, 2 Campb. 597. Ellenborough, C. J. 1811.

34. Goods may be detained for a debt, the remedy for which by action is barred by the statute of limitations. *Spears* v. *Hartly*, 3 Esp. 81. Kenyon, C. J. 1794.

And see post, LIMITATION OF ACTIONS, A. (b) 8, 9, 10.

LIMITATION OF ACTIONS.

A. IN ASSUMPSIT.

(a) *From what time to be computed.*

(b) *In what cases the statute does not attach.*

(c) *How avoided.*

(d) *Where waved.*

B. UPON TORTS.

A. IN ASSUMPSIT.

A. (a) *From what time to be computed.*

(And see ante, ANNUITY, pl. 14.)

1. Where a declaration is filed in vacation, entitled of the preceding term, the defendant may shew that the action was commenced after the six years had expired. *Snell* v. *Phillips, one, &c.* Peake, 209. Kenyon, C. J. 1794.

And see 2 Wms. Saund. 1. n. 1.

2. If the statute be pleaded to an action against an attorney for negligence, semble, that the six years must be reckoned from the period at which the plaintiff was damnified, not from the time when the blunder was committed. *Compton* v. *Chandless, one, &c.* 4 Esp. 18. Kenyon, C. J. 1801.

And see *Peake* v. *Ambler*, W. Jon. 329; S. C. Cro. Car. 349; *Shutfen* v. *Penow, ibid.* 139; *Hughes* v. *Thomas*, 13 East, 474; 15 Vin. Abr. Limitation, P; *Littleboy* v. *Wright*, 1 Lev. 69; *Hickman* v. *Walker*, Willes, 27; Ante, INSURANCE, O. (b).

3. In an action upon a note payable on demand, if no steps appear to have been taken during twenty years, the jury may presume payment. *Duffield* v. *Creed*, 5 Esp. 52. Ellenborough, C. J. 1803.

Acc. per Holt, J. Anon. 6 Mod. 22; but this was before the 3 and 4 Ann. cap. 9.

N. The pleadings in *Duffield* v. *Creed* do not appear. It has been held, that where the statute is pleaded to an action on a note payable on demand, the six years are to be computed from the date, not from the demand.

Acc. dict. per Lord Hardwicke, 1 Vez. 344, *Walmsly* v. *Child*. *Christie* v. *Fonseck*, Selw. 131, 339. But see *Harris* v. *Ferrand*, Hardr. 36; *Buckler* v. *Moor*, 1 Mod. 89; 15 Vin. Abr. Limitation, P. 14.

A. (b) *In what cases the statute does not attach.*

4. Where there are reciprocal demands, the statute of limitations does not attach, although the parties be not merchants. *Cranch, executrix, &c.* v. *Kirkman and others*, Peake, 121. Kenyon, C. J. 1792. 6 T. R. 191. S. C.

Acc. *Catling* v. *Skoulding*, 6 T. R. 189.

5. Unless a long period has intervened between the respective demands. *Ibid.*

And see *Cottes* v. *Harris*, Bull. N. P. 149; 2 Saund. 124; *ib.* 127, d. (n) 7. *Bridges* v. *Mitchell*, Bunb. 217; 2 Vern. 276.

6. Where there are cross demands arising out of the same transaction, and the plaintiff has kept alive his claim by continuing down process, he cannot avail himself of the statute of limitations to defeat the defendant's set-off. *Ord* v. *Ruspini*, 2 Esp. 570. Kenyon, C. J. 1797.

7. *Quære*, whether the demand of a joint obligor for contribution, is barred by a shorter period than an action on the bond itself. *Cole, executor of Cole*, v. *Saxby*, 3 Esp. 161. Eldon, C. J. 1800.

8. An acceptor may retain funds to indemnify him against his acceptances, though outstanding more than six years. *Morse and others, assignees of T. A. Kerrison*, v. *Williams and others*, 3 Campb. 418. Ellenborough, C. J. 1814.

9. The statute does not prevent a creditor from suing out a commission of bankruptcy. It extends only to the remedies by action mentioned in the act. *Fowler* v. *Brown*, 1 Bac. Abr. 400. Lord Mansfield, C. J. 1779.

S. C. Co. B. L. 16; overruled by Eldon, C. in *ex parte Dewdney*, 15 Ves. 479. And see *Quantock* v. *England*, 5 Burr. 2628, 2 Bla. 702; *Remington* v. *Stevens*, 2 Stra. 1271; Bull. N. P. 180.

10. So a carrier, &c. has a lien upon goods in his possession for a debt barred by the statute. *Spears* v. *Hartley*, 3 Esp. 81. Eldon, C. J. 1800.

N. Agreeably to the maxim, *quæ tem-*

poralia sunt ad agendum, perpetua sunt ad excipiendum.

And see Pothier, Charte-partie, part 1. art. 3. sect. 3. num. 92, 3. Sed vide Vinn. Inst. Imp. Comm. lib. 4. tit. 13. sect. 9. n. 2.

A. (c) *How avoided.*

11. Upon a replication of an *original*, sued out within time, it is sufficient to produce a *capias*. *Gosling* v. *Witherspoon*, 2 Wms. Saund. 1, e. Kenyon, C. J. 1788.

12. Under the statute the execution of a warrant of attorney has no greater operation than any other acknowledgment of the debt, not being a specialty whereon an action would lie. *Clarke, executor of Musgrave*, v. *Figes*, 2 Stark. 234. Abbott, J. 1817.

A. (d) *Where waved.*

(2 Anst. 527.)

13. In an action by A. against B. upon the joint note of himself and C. deceased, the mere payment of a sum of money to A. by C., in his life-time, will not take the case out of the statute. *Holme* v. *Green*, 1 Stark. 488. Ellenborough, C. J. 1816.

14. A new promise made by the wife of the debtor, entrusted by him with the management of the particular business out of which the debt arises, is sufficient to take it out of the statute. *Palethorp* v. *Furnish*, 2 Esp. 511, n. Lord Mansfield, C. J. 1783.

And see 2 Freem, 178; F. N. B. 120 G.

15. S. P. *Anderson* v. *Sanderson*, 2 Stark. 204, Holt, 591. Richards, C. B. York, 1817.

And see post, pl. 19.

16. Or a promise by any other agent so entrusted. *Ibid.*

17. S. P. ruled in *Burt, administrator*, v. *Palmer*, 5 Esp. 145. Ellenborough, C. J. 1804.

18. "What an extravagant bill you have delivered me." This admits that something is due. *Lawrence* v. *Worrall*, Peake, 93. Kenyon, C. J. 1790.

19. Creditor is referred by debtor to his trustee. This is a sufficient acknowledgment. *Baillie et alt.* v. *Lord Inchiquin*, 1 Esp. 435. Kenyon, C. J. 1796.

And see Com. Dig. Temp. G. 18.

20. And where the acknowledgment is general, and a preceding debt is proved, it lies upon the defendant to shew that the acknowledgment applied to a different demand. *Ibid.*

21. An acknowledgment made to a stranger, is sufficient. *Peters* v. *Brown*, 4 Esp. 46. Kenyon, C. J. 1801.

And see *Quantock* v. *England*, 5 Burr. 2628. S. C. 2 Bla. 702. *Trueman* v. *Fenton*, Cowp. 544, 8.

22. "I am bound in honour to pay, and I shall pay when I am able." Held, not sufficient, without proof of ability at the time of bringing the action. *Davies* v. *Smith*, 4 Esp. 36. Ellenborough, C. J. 1801.

And see ante, INFANT, B. (d).

23. A promise to pay by instalments, if time is given, is sufficient, without proof that time has been given. *Thompson* v. *Osborne*, 2 Stark. 98. Ellenborough, C. J. 1817.

24. "I have paid the debt, and will send a copy of the receipt," is not sufficient. *Birk* v. *Guy, gent.* 4 Esp. 184. Ellenborough, C. J. 1803.

25. But this has been since held a sufficient acknowledgment to go to a jury on failure to produce a receipt. Anon. cited, Holt, 381, and approved by Gibbs, C. J. 1816. Contra, post, pl. 30.

26. "I shall be able to satisfy him respecting the misunderstanding which has occurred between us," is not sufficient. *Craig* v. *Cox*, Holt, 380. Gibbs, C. J. 1816.

And see *Ward* v. *Hunter*, 6 Taunt. 210.

27. "I do not consider myself as owing the plaintiff any thing, as it is over six years since I contracted; I acknowledge having had the wheat, but I have paid part, and only 26l. remains due;" held sufficient to take the demand out of the statute. *Bryan* v. *Horseman*, 5 Esp. 81. Ellenborough, C. J. 1803.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 4 East, 599. S. C. 1 Smith, 125.

Cont. *Bicknell* v. *Keppel*, 1 N. R. 599. *Coltman* v. *Marsh*, 3 Taunt. 381.

28. So "If others pay I will pay."

Loweth v. *Fothergill*, 4 Campb. 185. Ellenborough, C. J. 1815.

And see *Douthwaite* v. *Tibbutt*, 5 M. & S. 75.

29. Where the defendant admitted that a debt had existed, but at the same time said, that he had since been a bankrupt, by which he was discharged, as well as by the length of time since the debt had accrued, it was held, that such an acknowledgment was sufficient to take the case out of the statute. *Clarke* v. *Bradshaw and Coghlan*, 3 Esp. 155, 7. Kenyon, C. J. 1800.

30. Held, that where a party who is applied to for the payment of a debt barred by the statute, says "I have a set off for a greater amount," the existence of the debt is admitted. *Swann* v. *Sowell*. Best, J. Launceston Assizes, 1809.

But the court of K. B. set aside a verdict for the plaintiff, on the ground that there must be an acknowledgment of an *existing* debt. T. T. 1819.

And see *Coltman* v. *Marsh*, 3 Taunt. 380. *Rowcroft* v. *Lomas*, 4 M. & S. 457.

31. "If you had presented the protest it would have been paid," is sufficient where no protest was necessary. *De la Torre* v. *Barclay and Salkeld*, 1 Stark. 7. Ellenborough, C. J. 1814.

32. Where the defendant admits that a debt has existed, but at the same time insists that it has been discharged by a written instrument, the whole declaration must be taken together. *Partington* v. *Butcher*, 6 Esp. 66. Mansfield, C. J. 1806.

And see *Earl of Mountague* v. *Lord Preston*, 2 Vent. 170.

33. Yet if it appear that the instrument referred to does not amount to a discharge, there remains a sufficient acknowledgment of the debt to take the case out of the statute. *Ibid.*

And see *Bermon* v. *Woodbridge*, Dougl. 788. Post, WITNESS, D. (c)

34. In an action against a husband for goods sold to his wife, whom he occasionally visits, a letter of the wife acknowledging the debt, is evidence of a new promise. *Gregory* v. *Parker*, 1 Campb. 394. Ellenborough, C. J. 1808.

35. The ground upon which the remedy is revived by a subsequent acknowledgment is, that the law implies a new promise to pay; but this principle is inapplicable to the case of a mere tort, or of a cause of action arising from the non-performance of some act at a particular time, as the non-acceptance of goods. *Boydell* v. *Drummond*, 2 Campb. 157. Ellenborough, C. J. 1808.

S. C. 11 East, 142, not S. P.

But a verbal promise will revive a written guarantee. Anon. K. B. 1818. Chitty on Bills, 455, n.

36. A letter from one of two parties to a joint and several promissory note, requesting the others to settle it, is sufficient to take the case out of the statute. *Halliday* v. *Ward, the elder*, 3 Campb. 32. Ellenborough, C. J. 1811.

And see *Whitcombe* v. *Whiting*, Dougl. 651. *Bryan* v. *Horsman*, 4 East, 599. S. C. 1 Smith, 125. But see *Brandram* v. *Wharton*, 1 B. & A. 463.

B. UPON TORTS.

(And see PENAL ACTION, A. (a); C.)

37. An officer acting *colore* officii, and not *virtute* officii, is not protected from actions brought after the expiration of six months. *Alcock* v. *Andrews*, 2 Esp. 542, n. Kenyon, C. J. 1788.

And see Anon. 1 Stra. 446. *Clements* v. *Keen*, 2 Smith, 220. *Weller* v. *Toke*, 9 East, 364.

38. Where a new offence is created, for which the defendant may be indicted or sued for a penalty, and the bringing of *actions* is limited to two years, the restriction does not extend to proceedings by indictment. *Dover* v. *Maestaer*, 5 Esp. 92. Ellenborough, C. J. 1803.

LITERARY PROPERTY.

A. WHAT MAY BE THE SUBJECT OF COPYRIGHT.

B. COPYRIGHT, WHERE VESTED.

C. WHERE INVADED.

D. ASSIGNMENT OF COPYRIGHT.

A. WHAT MAY BE THE SUBJECT OF COPYRIGHT.

1. The inventor of an etching who has neglected to engrave his name on the plate, pursuant to 8 Geo. II. cap. 13. s. 1. may maintain an action at common law for a piracy. *Roworth* v. *Wilkes*, 1 Campb. 94. Ellenborough, C. J. 1807.

See *Beckford* v. *Hood*, 7 T. R. 620.

2. Semble, that the words of a song applied to an old tune, and published with it on a single sheet of paper, are privileged as a *book* by 8 Ann, cap. 19. s. 1. *Hime v. Dale*, 2 Campb. 29, n. K. B. E. 4. Geo. III.

S. C. 11 East, 244, n. less fully reported.

3. But if such fugitive piece appear to be a libel, the jury, in an action for pirating it, will be directed to give no damages. *Ibid.*

And quære, whether, under such circumstances, the plaintiff would not be nonsuited; *Walcot* v. *Walker*, 7 Ves. 1.

And see post, TRESPASS.

4. A composition entirely musical, published on a single sheet of paper, is within the protection of the statute. *Clementi and others* v. *Goulding and others*, 2 Campb. 25. Ellenborough, C. J. 1809.

And the court of K. B. were unwilling to grant a rule nisi to set aside verdict for plaintiff. *Ibid.* and 11 East, 244.

5. S. P. semble admit: *Storace* v. *Longman*, 2 Campb. 27, n. Kenyon, C. J. 1788.

B. COPYRIGHT, WHERE VESTED.

6. An action lies for pirating additions to a work in which the plaintiff had originally no interest. *Cary* v. *Longman*, 3 Esp. 373. Kenyon, C. J. 1801.

See *Gibbs* v. *Cole*, 3 P. Wms. 255.

7. And semble, that the first publisher of a book, obtained by breach of trust, may sue a stranger who pirates it. *Cary* v. *Kearsley*, 4 Esp. 168. Ellenborough, C. J. 1802.

And see post, TROVER, A. 4, 5.

8. And the interest vested in the composer by this statute, is not affected by shewing that the song was composed to be sung by a particular performer at the opera, and that by the regulations of that establishment, such compositions become the property of the house. *Ibid.*

C. WHERE INVADED.

9. Mistakes in the names of places, in a topographical work, are retained in a subsequent publication by the defendant. This is not sufficient to support a count for pirating the plaintiff's work generally. *Cary* v. *Kearsley*, 4 Esp. 168. Ellenborough, C. J. 1802.

10. But semble, that such evidence would support a count for transcribing particular parts without the plaintiff's consent. *Ibid.*

11. It is lawful to adopt the works of a contemporary writer, and incorporate them in a new work, provided this be done *bonâ fide*, and not with a view to steal the original copyright. *Ibid.*

And see *Gyles* v. *Wilcox*, 2 Atk. 141, 3; Anon. Lofft. 775.

12. Secus, if so much be copied as to form a substitute for the original work. *Roworth* v. *Wilkes*, 1 Campb. 94. Ellenborough, C. J. 1807.

And see *Dodsley* v. *Kennersley*, Ambler, 403, 5; 1 Brown, 451; 2 Bro. 80.

D. ASSIGNMENT OF COPYRIGHT.

13. An agreement that A. shall have the exclusive publication in England, does not make him *assignee* of the copyright. *James Power* v. *Walker*, 3 Campb. 8. Ellenborough, C. J. 1814.

14. Nor can there be assignment without writing. *Ibid.*

15. But in action by an author, who had declared that he had parted with all his copyright, a valid assignment was presumed. *Moore* v. *Walker*, 3 Campb. 9, n. 1814.

16. An assignment of copyright must be in writing. *James Power* v. *Walker*, 4 Campb, 8. Ellenborough, C. J. 1814.

17. A verbal contract between the author and another person, whereby the latter is to have the exclusive publication of the work in England, does not entitle him to maintain any action for pirating it. *Ibid.*

And the court refused a rule to set aside nonsuit. *Ibid.* and 3 M. & S.

MANDAMUS.

1. A party who has obtained a mandamus to restore him to an office, cannot recover the costs of the application as consequential damage in an action for the amotion. *Harman* v. *Tappenden*, 3 Esp. 278. Kenyon, C J. 1801.

2. Nor can the action be maintained unless it appear that the defendants were individually and maliciously active in procuring the amotion. *Ibid.*

And the court of K. B. appears to have made absolute a rule for arresting judgment; 1 East, 555.

MANOR

(And see ante, COMMON.)

A. WHAT SHALL BE.

(And see ante, CUSTOM, pl 2, 3; EJECTMENT, pl. 12; EVIDENCE, pl. 32, 33, 34; FISHERY, pl. 1.)

1. A manor *by reputation* is sufficient to entitle the lord to manerial wastes. *Curzon and another* v. *Lomax*, 5 Esp. 60. Ellenborough, C. J. 1803.

And see *Soane* v. *Ireland*, 10 East, 259; *Rex* v. *Bishop of Chester*, Skin. 651, 61, 2; S. C. 1 Lord Raym. 291, 301; *Thinne* v. *Thinne*, 1 Lev. 27; Keilw. 150, 1; 2 Brownl. 223; Cary, 33, 4; *Lenon* v. *Blackwell*, Skinn. 191.

2. Upon admissions to distinct copyholds held by the same title, the steward is not, without a custom, entitled to full fees on each admission. *Everest* v. *Glyn*, Holt, 1. Gibbs, C. J. 1815. C. P. M. 1815.

And the court discharged a rule for entering a verdict beyond the quantum meruit found by the jury; 1 Marsh. 85.

B. COPYHOLDS.

3. An attorney may be appointed for the purpose of suffering a recovery of a copyhold, without an express custom. *Wymer* v. *Page*, 1 Stark. 9. Ellenborough, C. J. 1814.

MASTER AND SERVANT.

(And see WITNESS, C. (L).)

A. OBLIGATIONS OF SERVANT TOWARDS MASTER.

B. OBLIGATIONS OF MASTER TOWARDS SERVANT.

(a) *Wages.*

(b) *Care in sickness.*

(c) *Character.*

C. RIGHTS OF MASTER AGAINST STRANGERS.

D. LIABILITY OF MASTER TO STRANGERS.

A. OBLIGATIONS OF SERVANT TOWARDS MASTER.

1. A servant who having received money from his master to purchase articles, charges more for them than he has paid, is guilty of embezzlement, within 39 Geo. III. cap 85. Per Holroyd, J in *Braddick* v. *Croad*, Devon Spring Assizes, 1819.

2. Where a servant makes such fraudulent overcharge, without having previously received money, he is guilty of obtaining money under false pretences. *Ibid.*

And see *Rex* v. *Mason*, 2 T. R. 581. *Young* v. *the King*, 3 T. R. 98. *Rex* v. *Airey*, 2 East, 30. *Rex* v. *Binks*, 2 Smith, 619.

B. OBLIGATIONS OF MASTER TOWARDS SERVANT.

(And see post, MISDEMEANOR, A. (d).)

B. (a) *Wages.*

1. A negro slave, who continues his services in this country, is not entitled to wages without proof of an express contract. *Alfred* v. *Marquis of Fitzjames*, 3 Esp. 3. Kenyon, C. J. 1800.

2. Where a servant is discharged without notice or warning, he is entitled

to a month's wages beyond the wages due for the period of actual service. *Robinson* v. *Hindman*, 3 Esp. 235. Kenyon, C. J. 1800.

3. Unless he has misconducted himself, as by absenting himself without leave. *Ibid.*

B. (b) *Care in sickness.*

4. A servant in driving his master's cart, breaks his leg, and is cured by a surgeon employed and paid by the parish officers. The latter cannot recover from the master the amount of their disbursements. *Newby* v. *Wiltshire*, 2 Esp. 739. K. B.

S. C. Cald. 527. And see *Atkins* v. *Banwell*, 2 East, 505; Stat. 35 Geo. III. cap. 101. sect. 2; Bull. N. P. 129, 147, 281.

5. But it was held, that whilst the servant remains under the master's roof, the latter is liable to the surgeon who actually attends him. *Scarman* v. *Castell*, 1 Esp. 270. Kenyon, C. J. 1795.

See this case fully examined and overruled in *Wennall* v. *Adney*, 3 Bos. & Pull. 247.

B. (c) *Character.*

6. A servant cannot sue his master for refusing to give him a character. *Carrol* v. *Bird*, 3 Esp. 201. Kenyon, C. J. 1800.

And see Anon. 1 Mod. 78.

C. Rights of master against strangers.

7. Where a person retained by the manager of a theatre as a public singer, is beaten, and is thereby prevented from performing, the manager cannot sue for the consequential damage. *Taylor* v. *Neri*, 1 Esp. 386. Eyre, C. J. 1795.

And see F. N. B. 92, H. note (a); ante, Action on the case, A. (c) (d); Agent, D.

D. Liability of master to strangers.

(And see Agent, pl. 19, 47, 53, 61, 62, 63, 64, 65, 94, 95, 96, 133, 104. Evidence, pl. 310.

8. Horses let by A. to B. are driven by A's servant, through whose negligence the plaintiff's carriage sustains an injury. An action lies against A. *Sammell* v. *Wright*, 5 Esp. 263. Ellenborough, C. J. 1805.

And see Agent, C.

MERGER.

(And see Sav. 69, pl. 143.)

1. A guarantee by deed entered into by a third person *at the time of the contracting of the original debt*, does not extinguish the simple contract debt of the principal. *White* v. *Cuiler*, 1 Esp. 200. Kenyon, C. J. 1794.

And the court of K. B. discharged a rule for setting aside a verdict for the plaintiff. *Ibid.* and 6 T. R. 176.

S. P. contra, *Pudsey's* case, 2 Leon. 110.

Sed vide F. N. B. 121, M. note (d). *Ayrey* v. *Davenport*, 2 N. R. 474, 6. *Drake* v. *Mitchell*, 3 East, 251.

And see the distinction between an *expromissor* and an *adpromissor*, Vinn. Inst. Imp. Comm. lib. 2. tit. 1. *de rerum divisione, &c.* p. 175; *Ibid.* lib. 3. tit. 21. *de fidejussoribus*, p. 595; *Ibid.* lib. 4. tit. 6. § 9. *de constitutâ pecuniâ*, 731; *Anstey* v. *Marden*, 1 N. R. 124, 8; *Roe* v. *Haugh*, 1 Salk. 28; *Buckmyr* v. *Darnell*, 2 Lord Raym. 1085, 7.

MISDEMEANOR.

(And see ante, Agreement, pl. 34, 35, 36. Costs, pl. 3.)

A. What shall be.

(a) *Conspiracy.*

(b) *Offences against public decency.*

(c) *Offences against public health.*

(d) *Cruelty.*

(e) *Concealing pregnancy.*

(f) *Gaming,*

(g) *Disobedience of order of justices.*

B. PLEADINGS.

(a) *Form of indictment.*

(b) *Variance.*

C. EVIDENCE.

(a) *Formal.*

(b) *Admissible.*

(c) *Sufficient.*

D. PROCESS.

A. WHAT SHALL BE.

A. (a) *Conspiracy.*

(And see ACTION ON THE CASE, pl. 58.)

1. No indictment will lie for procuring the marriage of a female pauper, with a labouring man of another parish, who is not actually chargeab . *Rex v. Tanner et alt.* 1 Esp. 304. Ashhurst, J. Hertford, 1795.

2. A conspiracy to obtain money as a reward for an appointment to an office in the customs, to be made by the lords of the treasury, is an indictable offence at common law. *Rex* v. *Pollman and others*, 2 Campb. 229. Ellenborough, C. J. 1809.

N. Or by *statute* 11 H. 4.; vide 3 Inst. 146, 7 And see *Rex* v. *Vaughan*, 4 Burr. 2494.

3. A banker who has permitted money to be lodged at his house for the purpose of being paid over on the procurement of an office in the customs, may be indicted for a conspiracy with the parties who undertook to procure the appointment, and were to receive the money. *Ib a.*

And see 49 Geo. III. cap. 126 § 3.

4. Held, that a count charging that the defendants, conspired, &c. to assault and beat the prosecutor, and that in pursuance of such conspiracy, &c. they did assault and beat is bad. *Rex* v. *Barton and others.* Best, J. Devon Spring Assizes, 1819.

N. The objection was taken by the court before the opening of the case, and being acquiesced in by the leading counsel for the prosecution, the point was not argued. The decision appears to have been founded on *Rex* v. *Turner*, 13 East, 228, where it was held that a conspiracy to commit a trespass on land, for the purpose of killing game, was not an indictable offence, the object of the combination being the doing of an injury *merely civil*. But quære, whether a conspiracy to commit an assault, be not as a misdemeanor and criminal injury, distinguishable from a conspiracy to effect a *merely civil* injury, and whether, supposing the conspiracy to be bad, the direct allegation of an actual assault would not be sufficient to support a verdict, notwithstanding the immaterial inducement by which it was preceded.

5 Indictment for conspiracy to cheat in the sale of a horse, held not maintainable without proof of concert between the defendants to effectuate a fraud. *R.* v. *Pywell and others*, 1 Stark. 402. Ellenborough, C. J. 1816.

A. (b) *Offences against public decency.*

6. It is a misdemeanor for a man to expose his person on the sea-shore for the purpose of bathing, in a spot where he may be distinctly seen from the windows of newly erected houses, though before these houses were built, persons usually bathed there. *Rex* v. *Crunden*, 2 Campb. 89. Macdonald, C. B. Horsham, 1809.

And see *Rex* v. *Sir Charles Sedley*, 1 Keb. 620; S. C. Sid. 168. pl. 29, observed upon in *Rex* v. *Curl*, 2 Stra. 690

A. (c) *Offences against public health.*

7. A baker selling bread in which alum is found in large lumps, is guilty of a misdemeanor at common law, if he ordered alum to be used, though he gave directions for mixing it up in a manner which would render it innoxious. *Rex* v. *Dixon*, 4 Campb. 12. Ellenborough, C. J. 1814.

And see 37 Geo. III. cap. 98. sect. 21.

A. (d) *Cruelty.*

8. An indictment will lie for refusing to provide necessary food and clothing for a servant of tender years, who is

under the dominion and control of the defendant. *Rex* v. *Elizabeth Ridley*, 2 Camph. 650. Lawrence, J. Salop, 1811.

7. S. P. admit: per all the judges, upon a case reserved by Le Blanc, J. from the Exeter Assizes, 1802. *Ibid.*

8. And it is no objection that the offence consists merely in *non-feasance*. *Rex* v. *Ridley*, *ubi supra*.

9. Or that the defendant is a married woman. *Ibid.*

10. The exposing of a servant to the inclemency of the weather, is an indictable misdemeanor.

A. (e) *Concealing pregnancy.*

11. A woman tried *on the coroner's inquest* for the murder of her bastard child, may, under 43 Geo. 3. cap. 58. § 3, 4, be found guilty of the concealment. *Rex* v. *Mary Cole*, 3 Campb. 371. Bayley, J. Gloucester, 1813.

A. (f) *Gaming.*

12. Under an indictment on 9 Ann, c. 14. s. 5. for winning more than 10l. *to wit*, the sum of £—, the winning of a smaller sum may be proved. *R.* v. *Hill Darley, and others*, 1 Stark. 359. Ellenborough, C. J. 1816.

13. *Aliter*, if bills of exchange of a specific amount be stated. *Ibid.*

A. (g) *Disobedience to order of justices.*

14. An indictment against two members, the stewards of a friendly society enrolled in London, but removed and afterwards held in Middlesex, for disobedience to an order of two Middlesex magistrates to readmit an expelled member is good under 33 Geo. 3. c. 54. s. 15. and 49 Geo. 3, c. 125. s. 1. *R.* v. *Gash and another*, 1 Stark. 441. Ellenborough, C. J. 1816.

And the court refused a rule to enter a verdict for the defendant. *Ibid.*

A. (h) *False pretences.*

15. It is an indictable offence to obtain goods upon a cheque which the party knows will not be paid. *Rex* v. *Jackson*, 3 Campb. 370. Bayley, J. Gloucester, 1813. Post, pl. 18, 20, 1, 2, 3.

A. (i) *Extortion.*

16. An indictment does not lie against a turnpike-keeper for extortion in taking toll, upon the ground of an exemption not claimed when the toll was taken. *Rex* v. *Hamlyn*, 4 Campb. 379. Ellenborough, C. J. 1816.

B. Pleadings.

B. (a) *Form of indictment.*

17. Indictment under 17 Geo. 3. cap. 26, § 7. for taking a particular sum exceeding 10s. per cent. as brokerage on an annuity. The sum included a demand for preparing the deeds, &c. *Held* to be no variance. *Rex* v. *Gilham*, 1 Esp. 285. Kenyon, C. J. 1795.

And the court of K. B. discharged a rule for a new trial, on the ground that the precise quantum of excess was immaterial; 6 T. R. 265.

18. A porter, upon the delivery of a *basket of fish*, produces a false ticket, and receives 3s. 4d. more than he is entitled to. In an indictment upon 30 Geo. 2. cap. 24. for obtaining money by false pretences, the *basket of fish* may be described as a *parcel*. *Rex* v. *Douglass*, 1 Campb. 212. Ellenborough, C. J. 1808.

19. But in an indictment for taking more than the rate of porterage, upon 39 Geo. 3. cap. 58. which enumerates (sect. 1.) baskets *and parcels*, the variance would be fatal. *Ibid.*

20. An indictment upon 30 Geo. 2. cap. 24. for obtaining money by false pretences, averred, that the defendant pretended that *he had paid* a certain sum of money into the Bank of England; but it appeared, that he merely said, the money *had been paid* at the Bank. *Held*, that the variance was fatal. *Rex* v. *Plestow*, 1 Campb. 494. Ellenborough, C. J. 1808.

And see *Rex* v. *Fuller*, 1 Bos. & Pul. 184, 6.

21. And where such indictment charges the defendant with obtaining the money of A., and it appears that the money belonged to A's servant, who was *afterwards* reimbursed by his master, the variance is fatal. *Rex* v. *Douglass*, 1 Campb. 213. Ellenborough, C. J. 1808.

22. *Secus*, where the servant has in his hands at the time an equal or larger sum belonging to his master. *Ibid.*

23. Where a servant being directed to purchase sheep for his master, charges him more than he has paid, and subsequently receives the amount of such overcharge, he is guilty of obtaining money under false pretences. Per Holroyd, J. in *Braddick* v. *Croad*, Devon Spring Assizes, 1819.

24. A person may be charged with several offences of the same nature in the same indictment. And though, in felonies, it is usual for the judge to require the prosecutor to confine himself to one offence, this practice has never been extended to misdemeanors. *Rex* v. *Jones*, 2 Campb. 131. Ellenborough, C. J. 1808.

And see *Rex* v. *Kingston and others*, 8 East, 41.

25. Upon an indictment against A. B. and C. for conspiracy to obtain, viz. to the use of A. and B. 2000l. for procuring an official appointment, it appeared that C. did not know that A. was concerned in the transaction. The variance is fatal as to C. the averment respecting the application of the money being material, though laid under a *videlicet*. *Rex* v. *Pollman and others*, 2 Campb. 229. Ellenborough, C. J. 1809.

26. Where a count in an indictment undertakes to set out continuously the *substance* of what the defendant swore upon his examination, it must be proved, that, *in substance*, he swore the whole of what is so set out, though several distinct assignments of perjury are made thereon. *Rex* v. *Leefe, gent., one, &c.* 2 Campb. 134. Ellenborough, C. J. 1809.

27. An indictment charging the defendant, a feme covert, living separately and apart from her husband, with neglecting and refusing to provide necessary meat and drink for her servant, and keeping her without sufficient warmth, whereby she became sick and emaciated, was held insufficient in not alleging, that the servant was of tender years, and under the dominion and controul of the defendant. *Rex* v. *Elizabeth Ridley*, 2 Campb. 650. Lawrence, J. Salop, 1811.

S. P. there said to have been determined by a majority of the judges upon a case reserved by Le Blanc, J. from the Exeter Assizes, 1802. And an indictment against a master chimney sweeper for manslaughter by nonfeasance or omission, was held by Garrow, B. to be insufficient in not averring that the prisoner had the means of preventing the death of the child. O. B. December, 1817.

28. Where an indictment sets out an order made by B. U., *esquire*, one of his majesty's justices, assigned, &c. *for the county of C.*, and the order appears to have been made by B. U., *clerk*, a justice appointed for a *particular district* within the county, the variance is fatal. *Rex* v. *Tanner et alt.* 1 Esp. 304. Ashhurst, J. Hertford, 1795.

N. From the margin of this report the variance in the *addition* appears to have been principally relied on.

C. Evidence.

C. (a) *Formal.*

29. Upon an indictment for disturbing a congregation of protestant dissenters, it is not necessary to prove that the minister has taken the oaths prescribed by the toleration act. *Rex* v. *Hube*, Peake, 131. Kenyon, C. J. 1792.

C. (b) *Admissible.*

30. Evidence may be given of the proceedings of a particular combination, as introductory to proof that the defendants were concerned in it. *Rex* v. *Hammond and Webb*, 2 Esp. 719. Kenyon, C. J. 1799.

31. Under an indictment charging the defendants with conspiring to cause themselves to be reputed to be men of property, for the purpose of defrauding tradesmen; various instances of false representations made to different persons may be given in evidence. *Rex* v. *Roberts and others*, 1 Campb. 399. Ellenborough, C. J. 1808.

32. A. was convicted before two magistrates of having smuggled spirits in his possession upon the testimony of B. and others. An information was afterwards filed against A. for obstructing the officers, and B. swore to an *alibi*. Held, that the record of the conviction, setting

out the depositions of the witnesses, could not be read to contradict B.'s evidence. *Rex* v. *Howe*, 1 Campb. 461. Ellenborough, C. J. Maidstone, 1808.

C. (c) *Sufficient.*

33. Where a commissary who was directed in the warrant for his appointment to obey the orders of the lords of the treasury, was indicted for a fraud, a letter of instructions, received by the defendant, signed by three lords of the treasury, which he was accused of having disregarded, was admitted upon proof of the hand-writing of the three persons whose names were subscribed to it without producing the commission. *Rex* v. *Jones*, 2 Campb. 131. Ellenborough, C. J. 1808.

34. So, in an indictment for perjury, in an answer to an allegation exhibited before a surrogate, it is, *primâ facie*, sufficient to prove that he has generally acted in that capacity. *Rex* v. *Verelst*, *Esq.* 3 Campb. 432. Ellenborough, C. J. 1813.

35. But if it appear that the surrogate was irregularly appointed, the defendant must be acquitted. *Ibid.*

36. In a criminal information charging the defendant, *as major-commandant* of a battalion of volunteers, with defrauding government by returns of false musters, the production of the gazette in which the defendant's appointment is officially announced, is not sufficient evidence of such appointment, unless notice has been given to produce the original commission. *Rex* v. *Gardner*, 2 Campb. 513. Ellenborough, C. J. 1813.

And see *R.* v. *Holt*, 5 T. R. 436.

37. But he is concluded by styling himself *major-commandant* in his returns to the war-office. *Ibid.*

38. Proof that J. S. shortly before the preferring of the indictment was legally settled in the parish of A., is *primâ facie* sufficient to support an averment that he *now is* settled there. *Rex* v. *Tanner, et alt.* 1 Esp. 304. Ashhurst, J. Hertford, 1795.

And see *Rex* v. *Inhabitants of Wakefield*, 5 East, 335, 7, 8; S. C. 1 Smith, 512, 4.

39. A person indicted for a misdemeanor may be legally convicted upon the uncorroborated evidence of an accomplice. *Rex* v. *Jones*, *ubi supra.*

Atwood's case, 2 Leach, Cro. Cas. 521.

40. Upon an indictment for an attempt to commit a rape, as well as for the capital offence, evidence of the prosecutrix's general bad character is admissible; but not of particular facts. *Rex* v. *Clarke*, 2 Stark. 241. Holroyd, J. 1817.

41. The husband of a woman who charges a man with an attempt to commit a rape, may prove her state and appearance and that she made complaint at the time; though her declarations are not evidence of the facts. *Rex* v. *Clarke*, 2 Stark. 241. Holroyd, J. 1817.

D. PROCESS.

42. A recognizance for the appearance of persons charged with a misdemeanor, may be conditioned for their appearance in court at the trial, where the prosecutors think their presence desirable with a view to identity, &c. *Rex* v. *Meyer and others.* Abbott, C. J. Guildhall, 20 April, 1819.

E. NEW TRIAL.

43. Held, that where defendant has been acquitted upon an indictment for a misdemeanor, a new trial cannot be granted, even for a misdirection of the judge. *R.* v. *Cohen and Jacob*, 1 Stark. 516. Per Ellenborough, C. J. 1816.

MISNOMER.

(And see ante. ABATEMENT, B. (b).)

1. Declaration on bail bond stated that plaintiffs sued out a latitat against *Francis*, J. by the name of *John* J. Held, that *in an action against one of the bail*, this allegation was not supposed by the production of a writ against *John* J. though he signed the bond, "Francis J. arrested by the name of John J." and plaintiffs would have proved that he was their debtor, and the person whom they meant to hold to bail. *Scandover and*

others v. *Warne*, 2 Campb. 270. Ellenborough, C. J. 1809.

And see *Shadgett* v. *Clipson*, 8 East, 328. *Wilks* v. *Lorck*, 2 Taunt. 399, and cases there cited. *Dickinson* v. *Bowes*, 16 East, 110. *Kitchin* v. *Alder*, 1 Chitty, Rep. 282.

2. But semble, that the principal would have been estopped from objecting to the misnomer. *Ibid.*

3. Declaration sets out an information in chancery against T. *Eamy*, and avers that afterwards the answer of T. *Eamy* was filed, &c. The latter allegation is proved by the production of an office copy of an answer, entitled "the answer of T. *Eamy*," though signed T. *Amey*. *Salter* v. *Turner*, *clerk*, 2 Campb. 87. Macdonald, C. B. Horsham, 1809.

And see *Hedd and Chaloner's* case, 1 Leon. 146.

4. A misnomer of the plaintiff in the declaration cannot be taken advantage of at the trial. It is sufficient that the real plaintiff has a cause of action against the defendant, and that the latter knows by whom he is sued. *Boughton* v. *Frere*, 3 Campb. 29. Ellenborough, C. J. 1811.

Acc. Y. B. M. 27 E. 3, 12. And see *Dickinson* v. *Bowes*, 16 East, 110. *Mayor*, *&c. of Stafford* v. *Bolton*, 1 B. & P. 40.

5. William P. is asked, whether his name is not John P.; he answers in the affirmative; upon which process issues against him by the latter name, and his goods are taken to compel an appearance. He cannot maintain trespass against the officer. *Price* v. *Harwood*, 3 Campb. 108. Ellenborough, C. J. 1811.

And see *Clarke* v. *Istead*, 1 Lutw. 894. *Gould* v. *Barnes*, 3 Taunt. 504.

6. So where process issues against a person who keeps a shop, over the door of which is written John P., he is estopped from saying that his name is William P. and not John P. *Ibid.*

And see *Cole* v. *Hindson*, 6 T. R. 234, 5.

7. Held (with liberty to move), that to entitle H. S. *junior* to sue upon a note payable to H. S. it is sufficient to prove that he is in possession of the instrument and directed the bringing of the action. *Sweeting* v. *Fowler and another*, 1 Stark. 106. Bayley, J. 1815.

8. In the absence of such proof it will be presumed that the property in the note is in H. S. senior. *Ibid.*

9. In an action against two as drawers of a bill, it is sufficient to shew that two persons, bearing the surnames of the defendants, are in partnership, and that one of the partners acknowledged that the bill was drawn by them, without shewing that the defendants bear the Christian names assigned to them on the record. *Hodenpyl* v. *Vingerhoed and another;* Chitty on Bills, 489. Abbott, J. 1818.

10. S. P. ruled contra as to the Christian names of the plaintiffs; and the plaintiffs were nonsuited. *Acerro and others*, v. *Petroni*, 1 Stark. 100. Ellenborough, C. J. 1815.

Sed vide Com. Dig. Abatement, E. 18, 19, 20, 21; Bac. Abr. Abatement, D; *Mayor*, *&c. of Stafford*, v. *Bolton*, 1 B. and P. 40; 3 Anstr. 935: from which cases it may be collected that, provided the identity of the parties be established, any misdescription, even of the plaintiff's name, is immaterial. *Et vide supra*, pl. 4.

NOLLE PROSEQUI.

1. Where to a declaration on a joint contract, one of the defendants pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to the infant. He must discontinue, and commence a new action against the adult. *Chandler* v. *Parkes and Dankes*, 3 Esp. 76. Kenyon, C. J. 1800. *Jaffray* v. *Frebain and others*, 5 Esp. 47. Ellenborough, C. J. 1803.

And see *Boulter* v. *Ford*, 1 Sid. 76; S. C. 1 Keb. 284; Blake's case, 1 Sid. 378; *Noke* v. *Ingham*, 1 Wils. 89; *Teed* v. *Elworthy*, 14 East, 210, 3 Taunt. 307.

2. Where in an action against A. and B., A. pleads his certificate, whereupon a *nolle prosequi* is entered, an admission by A. before he obtained his certificate, is evidence against B. if it be shewn that A. and B. are partners. *Grant* v. *Jackson*, *Bart. and others*, Peake, 203. Kenyon, C. J. 1793.

NON-RESIDENCE.

1. Total want of health is a sufficient excuse for an absence of twenty years. *Scammell, qui tam* v. *Willett, clerk*, 3 Esp. 29. Buller, J. Chelmsford, 1799.

NUISANCE.

A. OFFENSIVE TRADES.

(a) *What shall be deemed.*

(b) *Where a public nuisance.*

(c) *Effect of acquiescence.*

B. OBSTRUCTION IN RIVERS.

C. NON REPAIR OF BRIDGES.

D. NUISANCE TO HIGHWAYS.

(a) *Dedication to the public.*

(b) *Obstruction.*

(c) *Encroachment.*

E. PLEADINGS.

F. EVIDENCE.

G. TRIAL.

A. OFFENSIVE TRADES.

A. (a) *What shall be deemed.*

1. The carrying on of an offensive trade is not indictable, unless it be destructive of the health of the neighbourhood, or render the houses uncomfortable or untenantable. *Rex* v. *Davey and another*, 5 Esp. 217. Heath, J. Surrey, 1805.

A. (b) *Where a public nuisance.*

2. A nuisance which merely affects the inhabitants of three houses, is not indictable. *Rex* v. *Lloyd*, 4 Esp. 200. Ellenborough, C. J. 1800.

A. (c) *Effect of acquiescence.*

3. A person cannot be indicted for continuing a noxious trade which has been carried on at the same place for nearly fifty years. *Rex* v. *Samuel Neville*, Peake, 93. Kenyon, C. J. 1791.

4. Or for setting up a noxious manufactory in a neighbourhood in which other offensive trades have long been borne with; unless the inconvenience to the public be greatly increased. *Rex* v. *Bartholomew Neville*, Peake 91. Kenyon, C. J. 1791.

B. OBSTRUCTIONS IN RIVERS.

5. No indictment lies against the owner of a vessel sunk by accident or misfortune, in a navigable river, for not removing it. *The King* v. *Watts*, 2 Esp. 675. Kenyon, C. J. 1798.

But see ante, ACTION ON THE CASE, pl. 69.

C. NON-REPAIR OF BRIDGES.

6. A parish wooden bridge, used occasionally by light carriages, is replaced by a spacious stone bridge, built by the trustees of a road. The county is bound to repair, and cannot plead, that the bridge has immemorially repaired by the parish. *Rex* v. *Inhabitants of Surrey*, 2 Campb. 455. Ellenborough, C. J. 1810.

Sed vide 43 Geo. 2. cap. 59. § 5. as to the liability of counties to the repair of bridges built since 24th June 1803. And see *Rex* v. *Inhabitants of Cumberland*, 6 T. R. 194. S. C. in error, 3 Bos. & Pul. 354.

7. A bar across a bridge locked, except in times of flood, is conclusive that the public have only a right to use the bridge at such times. *Rex* v. *Marquess of Buckingham and others*, 4 Campb. 189. Ellenborough, C. J. 1815.

8. If an indictment for not keeping such a bridge in repair, state that it is used by the subjects "at their free will and pleasure," the variance is fatal. *Ibid.*

D. NUISANCE TO HIGHWAYS.

D. (a) *Dedication to the public.*

9. A private court, situate by the side of a street, is left open to the public, and

is occasionally used as a communication from one part of the street to the other. This is a complete dedication to the public. *Rex* v. *Lloyd*, 1 Campb. 261. Ellenborough, C. J. 1808.

And see *Aspindall* v. *Brown*, 3 T. R. 265.

10. And the reversioner is bound by the acquiescence of his tenants, if his steward had notice of the public user. *Rex* v. *Barr*, 4 Campb. 16. Ellenborough, C. J. 1814.

11. And *semble*, that the acquiescence of successive tenants, during 50 years, is of itself sufficient. *Ibid.*

But see *Daniel* v. *North*, 11 East, 372.

12. But the erection of a bar to prevent the passing of carriages, rebuts the presumption of a dedication to the public: although the bar have been long broken down. *Roberts* v. *Karr*, 1 Campb. 262, n. Heath, J. Kingston, 1808.

And see *Trustees of Rugby Charity* v. *Merryweather*, 11 East, 375, n.

13. And the owner of the soil may at any time replace such bar. *Lethbridge* v. *Winter*, 1 Campb. 263, n. Marshall, serjeant, Somerset, 1808.

And the court of K. B. refused a rule nisi to set aside verdict. *Ibid.*

14. And though such a bar do not impede the passing of persons on foot, no public right to a foot way is acquired; as there can be no *partial* abandonment to the public. *Roberts* v. *Karr*, *ubi supra.*

15. The burthen of repairing a highway is imposed on particular persons by a public statute. This is a good defence under the general issue. *Rex* v. *Inhabitants of St. George, Hanover-square.* 3 Campb. 222. Ellenborough, C. J. 1812.

S. P. dub. *Rex* v. *Liverpool*, 3 East, 88. And see *Rex* v. *Bridekirk*, 11 East, 304; *Rex* v. *Lancashire*, 2 East, 366, 9.

16. By statute, the care of a certain street is vested in trustees, and other trustees are appointed to manage all the roads in the parish except this street. The parish is not discharged from the repair of the street. *Rex* v. *Inhabitants of St. George, Hanover-square*, 3 Campb. 222. Ellenborough, C. J. 1812.

And see *Rex* v. *Sheffield*, 2 T. R. 106.

D. (b) *Obstructions.*

17. It is a nuisance to keep stage coaches in the street, beyond the time necessary for loading and unloading. *Rex* v. *Cross*, 3 Campb. 224. Ellenborough, C. J. 1812.

And see *Rex* v. *Russell*, 6 East, 427; S. C. 2 Smith, 424.

18. Or to saw timber there for the purpose of enabling the defendant to get them into his yard. *Rex* v. *Jones*, 3 Campb. 230. Ellenborough, C. J. 1812.

19. No *indictment* will lie for obstructing a highway by the holding of a fair or market, after an uninterrupted user for 20 years. *The King* v. *Smith et alt.* 4 Esp. 109. Ellenborough, C. J. 1802.

And see 2 Saund. 175. n. 2.

D. (c) *Encroachment.*

20. If a person remove an encroachment, and leave that part of the road which was injured by the encroachment in a perfect state, his liability to repair *ratione coarctationis* ceases. *Rex* v. *Skinner*, 5 Esp. 219. Heath, J. Surrey, 1805.

21. A person charged *ratione tenuræ*, pleads that the liability to repair arose from an encroachment, which has been removed. It appears that the road has been repaired by the defendant for 25 years since the removal of the alleged encroachment.—This is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to shew the time when the encroachment was made. *Ibid.*

And see *Rex* v. *Stoughton*, 2 Saund. 157, 160, n. 12; S. C. *differently reported*, 2 Keble, 665; Armitage *ex-parte* Ambler, 295; EVIDENCE, F. (a) 133.

22. A highway, leading from A. to B. and communicating with C. by a cross-road, cannot be described as a highway leading from A. to C. and from thence to B. *Rex* v. *Canfield*, 6 Esp. 136. Ellenborough, C. J. Essex, 1810.

E. PLEADINGS.

23. Where the description of a road

in an indictment is too general, as being equally applicable to other roads, the objection can only be taken by a plea in abatement. *R.* v. *Hammersmith*, 1 Stark, 357. Ellenborough, C. J. 1816.

24. An indictment against a parish for not repairing one side of road, should state that the parish is bound to repair *ad filum viæ.* *Rex* v. *Inhabitants of the parish of St. Pancras*, Peake, 219. Kenyon, C. J. 1794.

25. *Semble*, that it is not sufficient to aver that a certain part of the road (setting out the length and one half of the breadth) is out of repair, and that the inhabitants, &c. ought to repair it. *Ibid.*

26. Indictment for non-repair of a way, plea immemorial liability of others as to all the ways, except one particular way, not the way in question. Held, that it is not necessary to shew the excepted road to have existed immemorially. *R.* v. *Ecclesfield*, 1 Stark. 393. Wood, B. York Summer Assizes, 1816.

F. EVIDENCE.

27. An acknowledgment by the defendant, that his trade was a nuisance, is admissible, though not conclusive, evidence against him, upon an indictment for carrying on the same trade in another place. *Rex* v. *Bartholomew Neville*, Peake, 91. Kenyon, C. J. 1791.

28. The record of a judgment against the parish upon an indictment for not repairing, was held to be conclusive evidence of the liability of the parish to repair, unless *fraud* could be shewn. *Rex* v. *St. Pancras, ubi supra.*

29. But in a subsequent case it was held, that where the township of A. sets up a custom for each township to repair its own roads, the record of a judgment against the parish at large, is only *primâ facie* evidence against the custom, and that it may be rebutted by shewing that the general issue was pleaded to the former indictment, without the concurrence of A. *Rex* v. *Eardisland*, 2 Campb. 494. Le Blanc, J. Hereford, 1810.

30. But where it was subsequently agreed that the vendor should deliver goods against ready money, applying the payments first in satisfaction of the old debt, it was held that the guarantee did not cover the goods supplied under the new arrangement. *Ibid.* Acc. 2 Wms. Saund. 159, c.

31. The record of an acquittal, is not evidence to shew that the parish is *not* liable. *Rex* v. *St. Pancras, ubi supra.*

N. The ground of this decision is stated to have been "that some other parties might have indicted them, and those parties could not be bound by this record." A satisfactory reason for rejecting the evidence altogether seems to be, that the acquittal may have proceeded upon the want of proof that the road was out of repair. And see Bull. N. P. 245.

32. An award is made against tenant for years, finding a liability to repair *ratione tenuræ.* The reversioners and succeeding tenants are not bound. *Rex* v. *Cotton*, 3 Campb. 444. Ellenborough, C. J. 1813. Ante, pl. 10, 11.

G. TRIAL.

33. To an indictment for non-repair of a highway, defendants plead liability of M. of Buckingham *ratione tenuræ, absque hoc*, that the defendants are liable; the issue lies upon defendants, notwithstanding the traverse, and they are entitled to begin and reply. *R.* v. *Inhabitants of the county of Southampton.* Holroyd, J. Sarum Lent Assizes, 1818.

OFFICE.

1. *Semble*, that the office of *under* or *deputy usher* of the court of king's bench is a distinct office from that of the *chief usher;* and that though the latter has the appointment of the deputy usher in the case of a vacancy, such appointment does not determine upon the death of the chief usher. *Green* v. *Hewett*, Peake, 182. Kenyon, C. J. 1793.

2. An officer who has power to appoint a deputy, cannot recover fees received by an intruder into the office of deputy, where the fees payable to the principal and the deputy are distinct. *Ibid.*

3. The inquisition taken in 1730, as to fees due to different officers, is conclusive evidence of the rights of such officers. *Ibid.*

And see ante, ASSUMPSIT, E. (a).

OFFICER.

A. Appointment.

B. Authority.

C. Privileges.

(a) *As defendants.*

(b) *In other cases.*

D. Liability.

E. Military officers.

(a) *Half-pay.*

A. Appointment.

(And see Misdemeanor, pl. 25.)

1. When a substitute for a person chosen constable, is approved by the inhabitants and sworn in, the liability of the principal is at an end; he cannot be called upon to serve, though the substitute abscond. *Underhill* v. *Witts*, 3 Esp. 56. Kenyon, C. J. 1799.

B. Authority.

2. A. being in the custody of a watchman, B. encourages him to resist. The watchman may imprison B. *White* v. *Edmunds and others*, Peake, 89, Kenyon, C. J. 1791.

3. Talking loudly in the street is not an offence which will justify a watchman in taking the party into custody. *Hardy* v. *Murphey and Wedge*, 1 Esp. 294. Eyre, C. J. 1795.

4. And the watchman, and a constable who adopts his acts, may be sued jointly for the imprisonment. *Ibid.*

But see 9 Wentw. 344, 6.

5. A constable may, on his own authority, take a party into custody for a mere assault, committed in his presence. *Coupey* v. *Henley, Whale, and Webster*, 2 Esp. 540. Eyre, C. J. 1797.

But see Savile 97, pl. 178. Post, pl. 18. And see ante, Felony, pl. 21.

6. And may keep the parties in custody until the affray is over. *Churchill* v. *Matthews and others*, Selw. 866. Bayley, J. W[illegible] 1808.

7. Or take them immediately before a magistrate. *Ibid.*

8. But if he were not present at the affray, he cannot arrest without a warrant, unless there be *sufficient ground* for supposing that a felony is likely to ensue. *Coupey* v. *Henley, ubi supra.*

9. But it has been held that a peace officer may arrest a person charged with felony, *or breach of the peace*, though no such offence have in fact been committed. *Williams* v. *Dawson*, cited 3 Campb. 421. Buller, J. 1788.

10. S. P. as to a charge of felony. *Hobbs* v. *Branscomb and others*, 3 Campb. 420. Ellenborough, C. J. 1813.

11. And he may justify under the general issue, *M'Cloughan* v. *Clayton & Riding*, Holt, 478. Bayley, J. Lancaster, 1816.

And see H. 7. H. 4. fo. 35. pl. 3; T. 11. E. 4. fo. 4. pl. 8; Bro. Faux Imprisonment, pl. 4, 25; *Samuel* v. *Payne*, Doug. 359; *Lidwith* v. *Catchpole*, Caldecott, 291; *Handcock* v. *Baker*, 2 Bos. & Pull. 260; Ante, Action, pl. 67.

C. Privileges.

C. (a) *As defendants.*

12. A constable acting *colore*, not *virtute, officii*, is not protected by 24 Geo. II. cap. 44. s. 8. from actions brought after the expiration of six months. *Alcock* v. *Andrews*, 2 Esp. 542. n. Kenyon, C. J. 1788.

And see Anon. 1 Stra. 446; *Clements & ux.* v. *Keen*, 2 Smith, 220; *Weller* v. *Toke*, 9 East, 364; *Dive* v. *Manningham*, Plowd. 64.

13. But upon the construction of a similar clause, in 50 Geo. III. cap. cxlix. it was held that the constable was protected where he *believed* he was acting within the powers of the statute. *Graves* v. *Arnold*, 3 Campb. 242. Mansfield, C. J. 1812.

Theobald v. *Crichmore*, 1 B. & A. 227.

14. A constable who imprisons a person on suspicion of felony, without any reasonable grounds, without warrant, and without a charge from any other person, is within the statute 21. J 1. c. 12. and must be acquitted, unless the venue be laid in the proper county. *Staight* v. *Gee and Garver*, 2 Stark. 445. Abbott, C. J. 1818. Post, Trespass, A. (a).

15. If a private person act in such case in aid of the constable and upon his command, he also is within the statute. *Ibid.*

16. Otherwise, if he be the prime mover and act as a principal in the transaction. *Ibid.*

17. A. takes out a warrant against B. and points him out to the officers, who apprehend him. A. may justify under the general issue, as acting *in aid* of the officers. *Ann Nathan* v. *Cohen and 3 others*, 3 Campb. 257. Ellenborough, C. J. 1812.

18. A constable is not protected if he act without a *warrant. Postlethwaite* v. *Gibson and Slade*, 3 Esp. 226. Kenyon, C. J. 1800.

S. C. Selwyn, 859, n. 15.

And see *Money* v. *Leach*, 3 Burr. 1742; *Gaby* v. *Wilts Canal Company*, 3 M. & S. 580; ante, pl. 5, 6, 7, 8, 9.

19. A constable acting under a warrant from a magistrate, cannot be sued without a demand of the copy of the warrant, notwithstanding the illegality of the warrant, or the want of jurisdiction in the magistrate. *Price* v. *Messenger et alt.* 3 Esp. 96. Eldon, C. J. 1800.

And the court of C. P. coincided with the chief justice. *Ibid.* 101, and 2 Bos. & Pul. 158.

20. Where the plaintiff declares generally, without charging the defendants as officers, he need not prove a demand of a copy of the warrant until the defendants have made it part of their case. *Ibid.*

21. A patrole employed by the parish, who is not a constable, or in any way sworn into the office, is not a *peace officer. Cliffe* v. *Littlemore*, 5 Esp. 39. Ellenborough, C. J. 1803.

22. Officers seizing goods which they bring to the police-office, are not responsible for the subsequent detainer of the goods at the office. *Ibid.*

C. (b) *In other cases.*

23. An inspector of lottery offices cannot refuse to serve as a constable; as the latter duty may be performed by deputy. *Rex* v. *Wood*, 1 Esp. 359. Kenyon, C. J. 1795.

Acc. Fane's case, 1 Lev. 233; Barker's case, 2 Roll. Abr. 272; post, Privilege, pl. 3. Cont. Stone's case, 1 Lev. 365; Vicar of Dartford's case, 2 Stra. 1107; Evendon's case, *ibid.* 1143; *Rex* v. *Warner*, 8 T. R. 375.

And as to the exemption of certificate men, under 10 and 11 Will. III. cap. 23; see *Rex* v. *Derbyshire*, 2 Burr. 1182; *Mostley* v. *Stonehouse*, 7 East, 174; S. C. 3 Smith, 181; S. C. (pleadings) MSS. D. 44.

24. A police officer who, in searching for other articles, discovers naval stores, and is the first person to communicate the discovery to the admiralty, is entitled to the moiety of penalty given to the *informer*, by 17 Geo. II. cap. 40. s. 10. *The King* v. *Blackman*, 1 Esp. 95. Kenyon, C. J. 1794.

D. Action.

D. (a) *Evidence in actions against.*

25. A warrant directed to A. and B. is returned indorsed by A. but the arrest is proved to have been made by a person calling himself B. This is evidence to charge B. with the arrest. *Slack* v. *Brander and Tebbs, sheriffs of London, and Coulson*, 1 Esp. 42. Kenyon, C. J. 1794.

26. In trespass for entering premises under pretence of a warrant to search, evidence may be given of what was said by a joint trespasser to induce the defendant to join in the trespass. *Goding* v. *Gill.* Ellenborough, C. J. Sittings after M. T. 1817.

27. Upon an indictment for cutting and maiming a sheriff's officer, the writ as well as the warrant must be produced. *Rex* v. *W. Meade and R. Meade*, Holt, 593, 2 Stark. 205. Wood, B. York, 1817.

28. And if the arrest were within a liberty, the writ must be a *non omittas. Ibid.*

29. A constable is not authorized in arresting a party as a receiver of stolen goods upon the mere assertion of the thief. *Isaacs* v. *Brand*, 2 Stark. 167. Ellenborough, C. J. 1817.

And see Hale, pl. 451; Foster's Disc. cap. 8. sect. 8; Harris's case, East, P. C. Addend a, 18.

E. MILITARY OFFICERS.

(And see ante, ACTION, pl. 58; AGENT, pl. 5; INSURANCE, pl. 30.)

E. (a) *Half pay.*

30. The King may at any time stop the half pay of an officer. *Macdonald v. Steele, Esq. and others*, Peake, 175. Kenyon, C. J. 1793.

S. P. per Lord Kenyon, in *Flarty* v. *Odlum*, 3 T. R. 681, 2.

31. But a *caveat*, entered by the regimental agent, to whom the officer is indebted, will not justify the detention of his half pay. *Ibid.*

Acc. *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248; *Barwick* v. *Reade*, 1 H. Bla. 628; *Stone* v. *Lidderdale*, 2 Anst. 533.

PARENT AND CHILD.

A. LIABILITY OF FATHER ON CONTRACT OF CHILD.

B. RIGHTS OF FATHER IN RESPECT OF INJURY TO CHILD.

A. LIABILITY OF FATHER ON CONTRACT OF CHILD.

1. Where a father allows his son a reasonable sum for his expenses, he is not liable for necessaries ordered by the son. *Crantz* v. *Gill*, 2 Esp. 471. Kenyon, C. J. 1796.

And see *Bainbridge* v. *Pickering*, 2 Bla. 1325; INFANT, A. (b).

2. A tailor who supplies a young man with clothes to an extravagant extent, cannot sue the father for any part of his demand. *Simpson* v. *Robertson*, 1 Esp. 17. Kenyon, C. J. 1793.

B. RIGHTS OF FATHER IN RESPECT OF INJURY TO CHILD.

(And see ante, ACTION ON THE CASE, A. (c).

3. A father may sue for the battery of his son, forming part of his family and living at his house, without evidence of service. *Jones* v. *Brown and another*, 1 Esp. 217, Peake, 233. Kenyon, C.J. 1794.

But see *Gray* v. *Jeffries*, Cro. Eliz. 55; *Barker* v. *Dennis*, *ibid.* 769: *Postlethwaite* v. *Parkes*, 3 Burr. 1878; *Rennett* v. *Allcott*, 2 T. R. 166.

PARLIAMENT.

(And see ATTORNEY, pl. 10, n.)

A. LIABILITY OF CANDIDATES FOR EXPENSES OF ELECTION.

B. PRIVILEGES OF MEMBERS.

(a) *Freedom of debate.*

A. LIABILITY OF CANDIDATES.

1. Sheriff may sue two parliamentary candidates upon an express joint promise to pay the expense of certain preparations for the election. *Wathen* v. *Sandys and another*, 2 Campb. 640. Lawrence, J. Gloucester, 1811.

2. But *semble*, that where the nature of the preparations has not been previously settled, and no joint contract has been made, the sheriff must sue each candidate separately upon 18 Geo. II. cap. 18. *Ibid.*

3. A candidate is liable for no expenses, except such as are imposed by statute, or by his own consent, express or implied. *Morris* v. *Burdett, Bart.* 1 Campb. 218. Ellenborough, C. J. 1808.

4. A candidate is liable to the sheriff for his proportion of the expense incurred in administering the oaths of allegiance and supremacy under 34 Geo. III. cap. 73. upon the requisition of another candidate, this statute not being confined to county elections. *Morris* v. *Burdett, Bart.* 1 Campb. 218. Ellenborough, C. J. and K. B. 1808.

5. But a candidate for the representation of a city or borough is not liable for hustings erected without his own consent or that of his agent. *Ibid.*

6. *Secus*, in a county election where the candidate is made liable by 18 Geo. II. cap. 18. s. 7. *Ibid.*

7. A. declares to the sheriff that a particular candidate disclaims all participation in the expenses of the election, but at the same time requires tickets of admission to the hustings for the friends of that candidate. The candidate is bound by such demand to contribute to the expense of erecting the hustings. *Ibid.*

8. In such case proof that the hustings have been used by persons whose acts the candidate has adopted, will be sufficient to make him liable. *Ibid.*

B. Privileges of members.

B. (a) *Freedom of debate.*

9. If a member of parliament publish in a newspaper a speech delivered in the house, containing slanderous charges, an information for a libel may be supported. *The King, on the prosecution of Sermon* v. *Lord Abingdon*, 1 Esp. 226. Kenyon, C. J. 1794.

10. A member may be called upon to state in evidence, whether another member took part in a particular debate. *Plunkett* v. *Cobbett*, 5 Esp. 136. Ellenborough, C. J. 1104.

11. But he cannot be compelled to disclose what was said by such member. *Ibid.*

12. If, however, he choose to state what passed, it will be received in evidence. *Ibid.*

PARTNERS.

(And see ante, Attorney, pl. 29; Gaming, pl. 10; Interest, pl. 1; post, Witness, C. (h).

A. What shall be a partnership.
- (a) *As between the parties.*
- (b) *With respect to strangers.*
- (c) *How proved.*
- (d) *Illegal.*

B. Act of co-partner, in what cases binding.

C. Dissolution of partnership.

D. Pleadings by partners.
- (a) *In actions by partners.*
- (b) *In actions against partners.*

E. Proceedings by one partner against another.

A. What shall be a partnership.

A. (a) *As between the parties.*

1. A father on his son's coming of age, tells him that he shall have *a share* in his business. The son is held out to the world as a partner, and acts in that capacity between five and six years. Upon an issue out of chancery to ascertain the son's interest, he will not be presumed to be entitled to a moiety on account of the indefinite nature of the agreement, but it will be left to the jury to consider what is a fair proportion under the particular circumstances of the case. *Peacock* v. *Peacock*, 2 Campb. 45. Ellenborough, C. J. 1809.

But Eldon, C. was not satisfied with this decision; 16 Ves. 56.

A. (b) *With respect to strangers.*

2. An agreement between A. the owner of a lighter, and the man who actually works her, that the latter shall receive one half of the *gross earnings* for his labour, does not constitute a partnership. *Dry* v. *Boswell*, 1 Campb. 329. Ellenborough, C. J. 1808.

3. But if the parties agree to divide the *net profits*, they are partners, and are jointly liable for the repairs of the lighter. *Ibid.*

4. And where A. B. C. D. and E. joint proprietors of a coach, agreed, that each should horse the coach one stage, *and that the general profits should be divided amongst them* in certain proportions, it was held, that the proprietors were jointly liable for hay ordered by A. for the use of his own horses, kept for working the stage allotted to him under the agreement. *Barton* v. *Hanson and others*, 2 Campb. 97 Macdonald, C. B. Maidstone, 1809.

But the court of C. P. granted a new trial, it appearing that what had been called a division of *profits*, was merely a

division of the *gross proceeds* in proportion to the number of miles worked by each proprietor. *Barton* v. *Hanson and others*, 2 Taunt. 49.

5. Where A. B. C. and D. are partners in a coach-concern, but A. provides the coaches at 3d. per mile, A. alone is responsible for repairs done to the coach by a person conusant of this arrangement, although the names of all four appear on the coach. *Viard and Jones*, v. *Bigg, Fleet, and Forder*. Holroyd, J. Winchester Spring Assizes, 1819.

6. But the parties are jointly liable to a passenger or a person who sends goods. *Ibid.* and *Waland* v. *Elkins*, 1 Stark. 272. Gibbs, C. J. 1816.

7. The owner of cattle agrees with a grazier, that the latter shall receive one half of what the cattle sell for above 20l. after being fattened on his land. This is merely a mode of paying for the pasture; it creates no partnership. *Wish* v. *Small*, 1 Campb. 331, n. Thompson, B. Exeter, 1808.

Acc. *Benjamin* v. *Porteus*, 2 H. Bl. 590. Sed vide APPENDIX III.

8. A. and B. carry on business together as attorneys. A. is liable to the penalty for not entering his certificate, though, by a private arrangement, A. was to derive no benefit from the suit. *Edmonson, qui tam*, v. *Davis, one, &c.* 4 Esp. 14. Kenyon, C. J. 1801.

9. A. B. and C. were partners as waggoners; the partnership was for the whole concern, but by under agreement amongst themselves, they horsed the waggon severally, and provided servants, &c. for distinct portions of the route. Held, that A. and B. are liable for damage done by a waggoner employed and paid by C. alone. *Waland* v. *Elkins*, 1 Stark. 272. Holt, 227. Gibbs, C. J. 1816.

A. (c) *How proved.*

10. A particular transaction being under discussion, A. acknowledges himself to be a partner with B. A. is not bound by a contract unconnected with this transaction. *De Berkom* v. *Smith and Lewis*, 1 Esp. 29. Kenyon, C. J. 1793.

And see Matthews, *ex parte*, 3 V. & B. 125; *Parker* v. *Barker*. 1 T. & B. 9.

11. But if A. represent himself publicly as the partner of B. he will be bound by a contract unconnected with the real object of the partnership. *Ibid.*

12. To charge two persons as joint purchasers of a cart, an entry of such cart in the tax-gatherer's book, as the property of both, is not evidence without shewing that the parties authorized the entry. *Weaver* v. *Prentice and Pratt*, 1 Esp. 369. Kenyon, C. J. 1795.

13. The unsigned entry in the office for licensing stage coaches is not evidence that the persons named in the licence are the owners. *Strother* v. *Willan and others*, 4 Campb. 24. Gibbs, C. J. 1814.

14. And an entry made at the custom-house (qu. excise office, 35 Geo. III. cap. 113. sect. 7), by A. in the names of A. and B. as dealers in beer, is merely *primâ facie* evidence of partnership even as against A. *Ellis and another* v. *Watson and others*, 2 Stark. 453. Abbott, C. J. 1818.

15. But in any proceedings by the crown it would be conclusive. *Ibid.*

And see ante, EVIDENCE, pl. 97, 98, 99; post, SHIP, G.

16. To charge A. and B. as partners, the record of an issue directed out of the exchequer, to try the fact of the partnership in a suit between A. and B., is evidence. *Whatley* v. *Menheim and Levy*, 2 Esp. 608. Kenyon, C. J. 1797.

17. Evidence which establishes a partnership as between the parties and third persons, will raise a presumption that they are partners *inter se*. *Peacock* v. *Peacock*, 2 Campb. 45. Ellenborough, C. J. 1809.

18. A person who suffers his name to appear in a firm, is liable for the engagements of the house, although he have no share in the profits of the trade. *Guidon* v. *Robson*, 2 Campb. 302. Ellenborough, C. J. 1809.

19. But he is not liable to parties who have notice of the circumstances. *Alderson* v. *Pope*, 1 Campb. 404, n. Ellenborough, C. J. 1808.

And see *Teed* v. *Elworthy*, 14 East, 214, and cases there cited.

20. Bills drawn upon A. and Co. are accepted by B. in the name of A. and Co. This is evidence to charge B. as partner. *W. Spencer* v. *Billing*, 3 Campb. 312. Ellenborough, C. J. 1812.

21. And it may be shewn that bills have been *invariably* accepted in this manner without producing them. *Ibid.*

22. But if the mode of dealing vary, the bills must be produced. *Ibid.*

23. A father who holds out to the world that his infant son is his partner, may call the son to disprove the partnership, in an action brought by himself alone. *Glossop* v. *Colman and others,* 1 Stark. 25. B. R. T. T. 1815.

24. In an action against A. and B. wherein A. pleads and B. is outlawed, a letter from B. admitting the partnership is admissible. *Sangster* v. *Mazarredo and others,* 1 Stark. 161. Ellenborough, C. J. 1816.

25. To prove that A. and B. are partners, it is sufficient to shew that they have acted as such, although the partnership may have been contracted by deed. *Alderson* v. *Clay,* 1 Stark. 406. Ellenborough, C. J. 1818.

A. (d) *Illegal.*

26. A bottomry bond made to two persons is void under 6 Geo. 1. cap. 18. s. 12. although they are also general partners. *Evirth* v. *Blackburne,* 2 Stark. 66. Ellenborough, C. J. 1817.

27. And an insurance effected on such an interest cannot be enforced. *Ibid.*

B. Act of co-partner, in what cases binding.

28. A. a partner with B. and C. draws a bill in blank in the partnership firm, payable to their order, and delivers it indorsed to a clerk to be filled up for the use of the firm as the exigencies of business may require, according to their course of dealing. A. dying, and the surviving partners assuming a new firm, the clerk fills up the bill, inserting a date prior to A.'s death, and sends it into circulation. The surviving partners are liable to a *bonâ fide* indorsee, although no part of the value come to their hands. *Usher and another* v. *William Dauncey and others,* 4 Campb. 97. Ellenborough, C. J. 1814.

And the court of K. B. refused to set aside the verdict. *Ibid.*

S. C. not S. P. 4 M. & S. 94.

29. Though one part owner of a ship has no implied authority to insure on account of the rest, yet, if they be also partners, an order to insure given by one renders all liable. *Hooper and another* v. *Lusby and others,* 4 Campb. 66. Ellenborough, C. J. 1814.

30. Where one partner clandestinely draws and accepts a bill in the name of the firm, partly for a demand which the payee has against the partnership, and partly for his own debt, the payee in an action against all the partners, can only recover upon the former part of the consideration; though money be paid into court on the count on the bill. *Barber* v. *Backhouse and others,* Peake, 61. Kenyon, C. J. 1791. Post, pl. 41, 2, 3, 4.

31. A. and B. trade under the firm of A. and Co.; A. and C. likewise trade under the same firm; B. is liable upon a bill issued by A. in the name of the firm, though drawn with reference to the concern carried on exclusively by A. and C. *Baker and others* v. *Charlton,* Peake, 80. Kenyon, C. J. 1791.

32. One partner, with the privity of his co-partner, draws bills on the firm in favour of A. who advance this amount, which is applied to partnership purposes. A. may sue both partners for money lent, or money had and received, though they are not jointly liable on the bill, it not having been accepted. *Denton and others* v. *Rodie and another,* 3 Campb. 493. Ellenborough, C. J. 1813.

And see *Shirreff* v. *Wilkes,* 1 East, 48; *Swan* v. *Steele,* 7 East, 210; S. C. 3 Smith, 109; *ex parte* Bonbonus, 8 Ves. 542; *ex parte* Gordon, 15 Ves. 286; *Jacaud* v. *French,* 12 East, 322; *Ridley* v. *Taylor,* 13 East, 175; *Emly* v. *Lye,* 15 East, 10; Pothier, Traité du Contrat de Societé, chap. 5. num. 92. *et seq.* post, pl. 40, 58, 59, 60.

33. A bill is delivered to A. and B. to be discounted; B. after the bankruptcy of A. transfers the bill to C. an innocent indorsee. The plaintiff was allowed to recover, with liberty to move. *Ramsbotham and others* v. *Cator,* 1 Stark. 228. Ellenborough, C. J. 1816.

34. One partner has no implied authority to bind another by a guarantee of the debt of a third person given in the name of the firm. *Duncan* v. *Lowndes*

and Bateman (Bateson), 3 Campb. 478. Ellenborough, C. J. 1813.

35. But a subsequent parol acknowledgment is evidence of such an authority. *Ibid.*

N. The 4th section of the statute of frauds does not require the agent to be authorized *in writing.*

36. A. draws and indorses a bill in blank in the firm of A. B. and C. for the purpose of raising money for the partnership. The bill is filled up and negotiated by a clerk after the death of A.; B. and C. are liable to a *bonâ fide* holder. *Usher and another* v. *William Dauncey and others*, 4 Campb. 97. Ellenborough, C. J. 1814.

37. A dormant partner may be made a co-defendant with the party who made the contract. *Grellier* v. *Neale and others*, Peake, 146. Kenyon, C. J. 1792.

38. If the defendant call a witness to prove that the goods for which the action is brought, were furnished on the credit and for the use of the latter, the plaintiff cannot, by merely *suggesting* that the witness is a partner, render him incompetent. *Birt* v. *Hood*, 1 Esp. 20. Kenyon, C. J. 1793.

39. But if it be admitted that he is a partner, he cannot be examined even to charge himself without a release from the defendant. *Young* v. *Bairner*, 1 Esp. 21, and 103. Kenyon, C. J. 1794.

40. Money borrowed on the partnership account, by one partner, for the purpose of defraying his expences whilst transacting the business of the house, is a charge upon the whole firm. *Rothwell* v. *Humphreys and Howell*, 1 Esp. 406. Kenyon, C. J. 1795.

And see Dig. 17, 2, 12; *ibid.* 17, 2, 52, 4; *ibid.* 17, 2, 61; Pothier, Traité du Contrat de Societé, chap. 7. num. 127, 8.

41. Where one partner clandestinely indorses in the name of the firm, an indorsee *with notice* cannot recover in a joint action. *Arden* v. *Sharpe and Gilson*, 2 Esp. 524. Kenyon, C. J. 1797.

42. A. draws a bill in the firm of A. and B. to the order of C. in satisfaction of a debt due from A. to C. who has no notice of the non-concurrence of B. C. cannot recover against A. and B. *Green* v. *Deakin and others*, 2 Stark. 347. Ellenborough, C. J. 1818.

And see *Shirreff* v. *Wilkes*, 1 East, 48; *Ridley* v. *Taylor*, 13 East, 175, 9.

43. But a bill drawn on a firm and accepted by one partner in his own name, binds the partnership in the hands of a *bonâ fide* indorsee, though the consideration for the acceptance be a separate debt. *Wells* v. *Masterman et alt.* 2 Esp. 731. Kenyon, C. J. 1799.

44. The drawing and accepting of such bill being, however, a fraud upon the other partners, it is void in the hands of the drawer. *Ibid.*

45. Where one joint trader buys goods, and instead of bringing them to the shop converts them to his own use, the partnership is liable; unless the seller were privy to the fraud. *Bond* v. *Gibson and Jephson*, 1 Campb. 185. Ellenborough, C. J. 1808.

And see *Willett* v. *Chambers*, Cowp. 814; D. 17, 2, 74.

46. A. advances money to B. on a note drawn by him in the firm of B. and C. after notice from C. that he will not be answerable for B.'s engagement. A. cannot recover in a joint action, though the money appear to have been applied to partnership purposes. *Lord Galway* v. *Matthew and Smithson*, 1 Campb. 403. Ellenborough, C. J. 1808.

47. A. being indebted to B. and C. as partners, allows the amount upon the settlement of a private account between himself and C. and takes a receipt from C. for the partnership demand; this is a good discharge. *Henderson and Smith* v. *Wild*, 2 Campb. 561. Ellenborough, C. J. 1811.

And see Appendix.

48. But if after an advertisement in the gazette, announcing a dissolution of the partnership between B. and C. and requiring debts to be paid to the former only, such a receipt be given by C. dated before the dissolution of partnership, it is fraudulent and void. *Ibid.*

And the court of K. B. refused a rule to set aside a verdict, found for the plaintiffs in conformity to his lordship's direction. *Ibid.*

49. One partner possesses no general authority under a power of attorney granted to his co-partner. *Edmiston* v. *Wright, Bart.* 1 Campb. 88. Ellenborough, C. J. 1807.

And see *Parker* v. *Kell*, 1 Salk. 96;

S. C. 1 Lord Raym. 658; Comber's case, 9 Ca. Rep. 76 a; *Warner* v. *Hargrave*, 2 Roll. Rep. 393; 2 Ch. cases, 202.

50. A. and B. are partners; A. gives notice to a creditor not to deliver goods without A.'s concurrence. To recover for goods sold after this notice, it must be to shew that A adopted the sale or derived benefit from the delivery. *Willis* v. *Dyson*, 1 Stark. 164. Ellenborough, C. J. 1816.

C. DISSOLUTION OF PARTNERSHIP.

51. General notoriety of the dissolution of a partnership is not sufficient to discharge the seceding partner from after-made contracts, where no notice has been inserted in the gazette. *Graham and another* v. *Thompson and another*, Peake, 42. Kenyon, C. J. 1791.

52. And with respect to persons who have dealt with the firm, an advertisement in the gazette is not sufficient. Notice should be sent to them individually. *Graham* v. *Hope*, Peake, 154. Kenyon, C. J. 1792.

And see 1 Siderf. 127.

53. Where there have been no previous dealings, an advertisement in the gazette is presumptive evidence of notice. *Godfrey* v. *Turnbull and another*, 1 Esp. 371. Kenyon, C. J. 1795.

54. From another report of the same case, however, it would seem, that the jury were directed to consider the point merely with reference to the probability of the plaintiff's having seen the gazette, putting it on the same footing as any other newspaper. It appears also, that the plaintiff received the note immediately from the fraudulent partner. *Godfrey* v. *Macauley and another*, Peake, 155, n. Kenyon, C. J. 1795.

55. And it seems to have been held that notice in the gazette is in no case sufficient, unless from other circumstances the jury infer that the party saw the gazette. *Ibid.*

56. But proof that the plaintiff habitually takes in a certain newspaper, is evidence to go to the jury that the plaintiff had notice of a dissolution of partnership announced in such paper. *Jenkins* v. *Blizard and another*, 1 Stark. 418. Ellenborough, C. J. 1816.

57. Notice by a partner that the partnership "has been dissolved," is evidence of the dissolution as against him, although the partnership articles require a dissolution by deed. *Doe* d. *Waithman* v. *Miles*, 1 Stark. 181. Ellenborough, C. J. 1816.

58. Upon the dissolution of the partnership between A. and B., the latter is entrusted with the settlement of affairs. He cannot indorse, in the name of the firm, a security which formed part of the joint effects. *Abel and another* v. *Sutton*, 3 Esp. 108. Kenyon, C. J. 1800.

S. P. *Kilgour* v. *Finlayson*, 1 H. Bl. 155.

59. Nor would A. be liable though the money obtained upon negotiating the security had been applied in liquidation of the partnership debts. *Ibid.*

S. P. *Kilgour* v. *Finlayson*, 1 H. Bl. 155.

60. And *semble*, that A. would not have been liable upon such an indorsement, though made whilst the partnership subsisted, if the security had not been negotiated until after the dissolution. *Ibid.*

61. A person who retires from a partnership without giving notice in the gazette, and suffers his name to remain in the firm, is liable for the engagements of the firm, with a party whose dealings began subsequently to the dissolution of partnership, provided he had no notice of the circumstances. *Parkin* v. *Carruthers et alt.* 3 Esp. 248. Le Blanc, C. J. 1800.

62. But where after notice of dissolution, published in the *gazette*, and sent round to the proper parties, one of the partners carries on business under the old firm, the seceding partners are not bound to apply for an injunction; nor are they liable to a party who was ignorant of the dissolution of partnership, unless it appear that they have interfered in the business or authorized the use of their names. *Newsome* v. *W. Coles, G. Coles, and C. Coles*, 2 Campb. 617. Ellenborough, C. J. 1811.

63. An alteration in the printed cheques is a sufficient notice of a change in the firm of a banking-house to customers who have used the new cheques. *Barfoot and others* v. *Goodall and others*,

3 Campb. 147. Ellenborough, C. J. 1811.

64. A notice of the dissolution of a partnership constituted by deed is sufficient evidence of the dissolution as against the parties signing it. *Doe d. Waithman and others* v. *Miles*, 1 Campb. 372. Ellenborough, C. J. 1816.

65. When the minute for advertising a dissolution of partnership in the *Gazette*, signed by the parties and attested, is produced as evidence of an actual dissolution, it requires an agreement stamp. *May* v. *Smith*, 1 Esp. 283. Kenyon, C. J. 1795.

66. A dormant partner whose name has never been announced, may withdraw from the concern without making the dissolution of partnership publicly known. *Evans* v. *Drummond*, 4 Esp. 89. Kenyon, C. J. 1801.

67. But if the acting partner state the existence of the partnership to a party who deals with the firm, the dormant partner is liable until such party has notice of the dissolution. *Ibid.*

68. Although the communication were made after the partnership had in fact ceased. *Ibid.*

69. The plaintiff is privy to an intention of A. and B. to dissolve their partnership, which is in the course of execution. In an action founded upon a supposed subsequent partnership transaction, the plaintiff must shew that the intention was abandoned. *Paterson* v. *Zachariah and Irn ld*, 1 Stark. 71. Ellenborough, C. J. 181[illegible].

70. Where A. and B. give their acceptance for goods furnished on their joint credit, and after a dissolution of partnership, the holder and vendor take the separate bill of A. as a renewal of the former bill, B. is discharged. *Ibid*, and *Reed* v. *White and others*, 5 Esp. 122. Ellenborough, C. J. 1804. *Smith* v. *De Silva*, Cowp. 469.

71. *Secus*, where the separate bill is given merely as a collateral security. *Bedford* v. *Deakin*, 2 Stark. 178. Ellenborough, C. J. 1817. 2 B. & A. 210.

72. A partnership created by articles, not under seal, which contain an agreement for a partnership deed, may be dissolved at pleasure. *Rackstraw* v. *Imber*, Holt, 368. Gibbs, C. J. 1816.

73. Where an account is taken at the dissolution of a partnership, assumpsit will lie for the balance, without an express promise. *Rackstraw* v. *Imber*, Holt, 368. Gibbs, C. J. 1816.

D. Pleadings by partners.

D. (a) *In actions by partners.*

74. Assumpsit, by partners holders of bills indorsed in blank, and held that it is unnecessary to prove their partnership, or any joint title. *Ro[illegible] and another*, v. *Leach*, 1 Stark. 1[illegible]. Ellenborough, C. J. 1[illegible].

75. An after-taken partner cannot sue, though by the articles of partnership, he is to have a share in past transaction. *Wilsford, et alt.* v. *Wood*, 1 Esp. 182. Kenyon, C. J. 1794.

S. P. Dig. 17, 2, 3. And see *Young* v. *Hunter*, 4 Taunt. 582.

76. The nonjoinder of a dormant partner is a no ground of nonsuit. *Leveck and Pollard* v. *Shafto*, 2 Esp. 468. Kenyon, C. J. 17[illegible].

S. P. *Lloyd* v. *Archbowle*, 2 Taunt. 324, *Mawman* v. *Gillett*, *ibid.* 32[illegible], n.

N. And quære whether making the dormant partner a co-plaintiff, would not have been a misjoinder? vide dict. per Mansfield, C. J. 2 Taunt. [illegible]7.

And see *Lucas* v. *De la Cour*, 1 M. & S. 249, Matthews, *ex parte*, 3 V. & B. 125.

77. Although the dormant partner be joined, the defendant may set off a debt owing to him from the ostensible partner only. *Stacey Ros[illegible] et alt* v. *Decy*, 2 Esp. 4[illegible], n. Kenyon, C. J. 1789.

S. C. 7 T. R. 361, n.

78. A surviving partner may declare generally upon a contract entered into with him and his deceased partner, as upon a contract made with himself alone. *Ditchburn* v. *Spracklin, and others*, 5 Esp. 31. Ellenborough, C. J. 1803.

Acc. Read's case, Savile 92, pl. 171, Co. Litt. 37 b, *Brereton et ux.* v. —*Noy's Rep.* 135, 2 Vin. Abr. Actions (Joinder). Dd. pl. 16, *Hyat* v. *Hare*, Comberb. 382, recognized 2 T. R. 479; *Richards* v. *Heather*, 1 B. & A. 29.

Cont. 2 Wms. Saund. 121 n. 1, 2 M. & S. 25. per Le Blanc, J.

Contra as to declaration against a

surviving partner. *Tissard* v. *Warcup*, 2 Mod. 279, 280; *Spalding* v. *Mure*, 6 T. R. 363, 5; Com. Dig. Abatement, F. 8.

And see 1 Wms. Saunders, 291, f, g; *Greenway* v. *Hornblow*, Hardres, 221; F. N. B. 556, Note b; *Holdwich* v. *Chafe*, Alcyn, 41; 5 Ves. 295; post, VARIANCE.

N. A surviving feoffee may plead a feoffment to himself, without naming his joint feoffee, Co. Lit. 185, *ibid.* 37 b, 1 Tho. Co. Lit. 609, 749, F. N. B. 219, B; *Harrison* v. *Belsey*, T. Raym. 413.

79. But a surviving lessor cannot recover on a count *for use and occupation* in which his deceased co-lessor is not named. *Lazarus* v. *Simmonds*. Abbott, J. London, 6 May, 1818, MSS.; S. C. by the name of *Israel* v. *Simmons*, 2 Stark. 356.

And the court refused a rule to set aside nonsuit, on the ground that the plaintiff should either have declared as surviving lessor, or have stated that the defendant was indebted to the plaintiff for use and occupation by the sufferance of plaintiff and *of the deceased*. *Ibid.*

Acc. per Littleton, M. 14, L. 4. fo 1, pl. 5; S. P. Anno 8, E. 2. Itin. Can. Fitz. Entre, 77.

80. A. and B. are joint tenants of a farm and stock. A.'s interest in the stock is taken in execution and sold to C. Held, that C. stands in the shoes of A. and cannot maintain an action for money had and received against B. who sells the whole stock. *Leigh*, *gent.* v. *Bradford*. Abbott, J. Devon Spring Assizes. 1818.

D. (b) *In actions against partners.*

81. An attorney is not culpable in neglecting to file a plea of nonjoinder in abatement expressly for delay. *Johnson*, *gent.* v. *Alston*, 1 Campb. 176 Ellenborough, C. J. 1808.

E. PROCEEDINGS BY ONE PARTNER AGAINST ANOTHER.

82. Ejectment on the demise of one copartner against another, after dissolution of partnership, for a house agreed to be occupied by the partners during its continuance, lies without notice to quit. *Doe* d. *Waithman* v. *Miles*, 1 Stark. 181. Ellenborough, C. J. 1816.

And see ante, ACTION, E, (a).

83. A. and B. being partners, a bill is indorsed to A. in respect of a particular partnership transaction. A. indorses it to B. who indorses over, and promises A. that if the latter will take up the bill when dishonoured, he will pay him one half of the amount. This is not such an insulated transaction as will entitle A. to maintain assumpsit against B. *Robson* v. *Curtis*, 1 Stark. 78. Ellenborough, C. J. 1815.

PATENT.

A. DESCRIPTION OF THE INVENTION IN THE LETTERS PATENT.

B. FORM OF SPECIFICATION.

C. INROLMENT.

A. DESCRIPTION OF THE INVENTION IN THE LETTERS PATENT.

1. A patent "for an improved method of lighting cities, towns, and villages," is too general, where, from the specification, it appears that the invention consists merely in the improvement of an old street lamp. *Lord Cochrane* v. *Smethurst*, 1 Stark. 208. Le Blanc, J. 1815.

B. FORM OF SPECIFICATION.

2. A patent is void, if the specification omit an ingredient used by the inventor for expediting the process. *Wood and others* v. *Zimmer and others*, Holt, 58. Gibbs C. J. 1815.

3. Or if the article has been publicly sold by the inventor before he obtained his patent. *Ibid.*

4. Where a patent is obtained for an *improvement*, a specification not distinguishing what is new from what is old, is bad. *Macfarlane* v. *Price*, 1 Stark. 199. Ellenborough, C. J. 1816.

But see *Harmer* v. *Playne*, 11 East, 101; *Bovill* v. *Moore*, 2 Marshall, 211.

5. And although an inventor introduce a new or extend an old principle, yet, if his specification be limited to the old principle, the patent is void. *R.* v. *Cutler*, 1 Stark. 354. Ellenborough, C. J. 1816. Post. Penal Action, pl. 16.

C. Inrolment.

6. A proviso that a specification shall be inrolled within one calendar month next *after* the date, which is the 10th May, is satisfied by an inrolment on the 10th of June. *Watson* v. *Pears*, 2 Campb. 294. Ellenborough, C. J. 1809.

S. P. *Thomas* v. *Topham*, Dyer, 218, b; Anon, (but S. C.) F. Moore, 40; Clayton's case, 5 Co. 1, b.

PAUPER.

(And see ante, Game, pl. 8.)

1. Where a servant in husbandry is seized with a sudden and dangerous illness in a distant parish, the overseers of *that* parish are bound to support him. *Simmons* v. *Wilmott and others*, 3 Esp. 91. Eldon, C. J. 1800.

2. And a stranger who takes care of the pauper, without the interference of the parish officers, may recover from them the money he expends. *Ibid.*

And see *Atkins* v. *Banwell*, 2 East, 505; *Wennall* v. *Adney*, 3 Bos. & Pul. 247, 9; 2 Nol. P. L. 240. Cont. 12. Vin. Abr. Evidence, (T. b. 11.) pl. 22; Ante, Master and servant, A. (b).

PENAL ACTION.

(And see Attorney, A.; Misdemeanor, pl. 43; Non-residence, Practice, N.)

A. Cases upon particular statutes.

(a) 5 *Eliz. cap.* 4.
(b) 5 *Eliz. cap.* 9.
(c) 13 & 14 *Car.* 2. *c.* 15. *s.* 12.
(d) 11 *Geo. II. cap.* 19. *sect.* 4.
(e) 18 *Geo. II. cap.* 20.
(f) 25 *Geo. II. cap.* 36. *sect.* 2.
(g) 32 *Geo. II. cap.* 28.
(h) 14 *Geo. III. cap.* 49.
(i) 14 *Geo. III. cap.* 78. *sect.* 67.
(k) 22 *Geo. III. cap.* 47.
(l) 28 *Geo. III. cap.* 52.
(m) 29 *Geo. III. cap.* 26. *s.* 13.
(n) 37 *Geo. III. cap.* 73.
(o) 38 *Geo. III. cap.* 71. *sect.* 2.
(p) 49 *Geo. III. cap.* 126. *s.* 6.

B. Pleadings.

C. Evidence.

A. Cases upon particular statutes.

A. (a) 5 *Eliz. cap.* 4.

(And see post, A. (c).)

1. A person who has conducted the business of a manufacturer for seven years as managing clerk, though never engaged in the manual labour of the business, is entitled to exercise the trade himself. *Smith* v. *Company of Armourers and Braziers of the City of London*, Peake, 148. Kenyon, C. J. 1792.

And see 1 Saund. 312, n. 1; *Keen* v. *Dormay*, 15 East, 161.

2. In debt for using a trade without having served an apprenticeship, the whole time laid in the declaration need not be proved, provided it be averred that the defendant forfeited 40s. for every month. *Powell, qui tam* v. *Farmer*, Peake, 57. Kenyon, C. J. 1791.

3. A master sawyer employs a person in his trade who has never before worked in it, under a parol agreement to teach him the business in consideration of a future premium, without any stipulation as to time, and to pay him weekly wages. This is not an apprenticeship within 5 Eliz. cap. 4. sect. 31. so as to protect the employer from the penalty of setting to work in his trade a person *who has not been brought up or served therein seven years as an apprentice. Beale, qui tam* v. *Geale*, 2 Campb. 1. Ellenborough, C. J. 1809.

4. A person is not liable to penalties

as exercising a trade without having served an apprenticeship, provided such trade be *incidental* to his general business, and carried on by persons who have served a regular apprenticeship to it. *Coward* v. *Maberley*, 2 Campb. 127. Ellenborough, C. J. 1810.

5. S. P. said to have been ruled by Lawrence, J. *Ibid.*

6. Thus a coachmaker who has not served an apprenticeship to the trade of a blacksmith, may employ regular journeymen blacksmiths in making the iron work of coaches. *Ibid.*

7. So a master carpenter may employ journeymen sawyers. *Ibid.*

8. In debt *qui tam* for setting a person to work in the trade of a sawyer, who has not served an apprenticeship, if that business appears to have been merely auxiliary to the trade actually carried on, the variance is fatal. *Spencer, qui tam* v. *Mann and others*, 5 Esp. 110. Ellenborough, C. J. 1804.

9. But *semble*, that a mere misdescription of the trade of the party who sets the unqualified person to work, is immaterial. *Ibid.*

And see *Beach* v. *Turner*, 4 Burr. 2449.

10. In an action for setting to work a journeyman who has not served an apprenticeship, the plaintiff cannot recover such part of the penalties as were completely incurred a year before action brought, though the defendant continued to employ the journeyman within the year; each month's employment being a distinct offence, and the bringing of the action limited to one year after the offence committed. *Evans, qui tam,* v. *Hunter*, 2 Campb. 293. Ellenborough, C. J. 1809.

11. The business of a coachmaker may be followed without having served an apprenticeship, as this trade was unknown in England when the statute passed. *Pride, qui tam,* v. *Stubbs*, 2 Campb. 397, and 6 Esp. 131, S. C. Ellenborough, C. J. 1810.

12. *Semble*, that the court will determine whether the trade stated in the declaration, is within the statute or not. *Ibid.*

And see 1 Saund. 312, a.; Com. Dig. Trade, D. 5; Cro. Car. 499, *Rex* v. *Fredland.*

13. To employ a journeyman who has not served an apprenticeship, in any *substantive part* of the business of a bookbinder, is a violation of the statute, though such person be wholly unacquainted with the other stages of the business. *Pratt, qui tam,* v. *Fraser and another*, 3 Campb. 14. Ellenborough, C. J. 1811.

14. The trade of a bookbinder being known in England previously to 5 Eliz. is within the statute, notwithstanding a material alteration has taken place as to the mode of carrying it on. *Ibid.*

15. Where the trade is not specified in the statute, it is incumbent on the plaintiff to prove, by books or other evidence, that it existed in England before the passing of the act. *Martins, qui tam* v. *Galloway*, 3 Campb. 121. Ellenborough, C. J. 1811.

16. A new trade, founded upon a modern invention, does not fall within the statute, though some of its intermediate operations be mentioned in the act. *Ibid.*

17. A person does not incur a penalty under 5 Eliz. cap. 4. s. 41. who employs an unqualified journeyman, unless it appear that he knew that he was unqualified, or neglected the means of information. *Holden, qui tam* v. *Lawrie*, 3 Campb. 188. Ellenborough, C. J. 1812.

18. The penalty is not incurred unless the unqualified person be employed during one entire month in the same county. *Cunningham, qui tam,* v. *Watson*, 3 Campb. 249. Ellenborough, C. J. 1812.

19. And it was ruled that if a trade, exercised by an unqualified person, be not continued during a whole month, the penalty does not attach. *Rex* v. *Barnett*, 3 Campb. 344. Ellenborough, C. J. 1812.

A. (b) 5 *Eliz. cap.* 9. *s.* 12.

20. No action lies against a witness for not attending upon a subpœna, unless the cause were called on and the jury sworn. *Bland* v. *Swafford*, Peake, 60. Kenyon, C. J. 1791.

And see *Hallet* v. *Mears*, 13 East, 15.

A. (c) 13 *and* 14 *Car.* 2. *cap.* 15. sect. 12.

21. An executor continuing the trade of his testator solely for the benefit of the widow and children, who does not take any active part in the conducting of the business, is not liable to the penalty of 40s. per month, provided against "persons who shall *directly or* "*indirectly* use, exercise, *continue*, or "set up the trade of a *silkthrower* "within this realm of England, unless "such as are or shall be apprentices to "the said trade, or shall have served "seven years apprenticeship thereto at "the least." *Meazcan* v. *Pearsall*, 6 Esp. 1. Ellenborough, C. J. 1806.

And see 1 Saund. 312, n. 1; *Raynard* v. *Chase*, 1 Burr. 2; S. C. 2 Wilson, 40; ante, A. (a).

A. (d) 11 *Geo. II. cap.* 19. *s.* 4.

22. A landlord may sue in the superior courts for the penalty enacted by 11 Geo. II. c. 19. although the value of the goods be under 50l. in which case a summary remedy is given before justices of the peace. *Horsefall* v. *Davy*, Holt, 147. Gibbs, C. J. 1816.

And see DISTRESS, A. (b).

A. (e) 18 *G. II.* c. 20. *qualification of magistrates.*

23. In an action for the penalty incurred by acting as a magistrate without being qualified, the defendant is not entitled to notice of action. *Wright* v. *Horton*, Holt, 458. Wood, B. York, 1816. See post, PLEADING, pl. 17.

A. (f) 25 *Geo. II. cap.* 36. *s.* 2.

24. A house kept for dancing, to which persons are indiscriminately admitted, is within the statute, though the parties merely dance for their own amusement. *Clarke* v. *Searle*, 1 Esp. 25. Kenyon, C. J. 1793.

25. A room in which musical performances are regularly exhibited, though it be not kept expressly or solely for that purpose, requires a licence. *Bellis* v. *Beal*, 2 Esp. 592. Kenyon, C. J. 1797.

S. C. not S. P. Tidd, 555.

26. A room kept for dancing, to which no persons are admitted but *subscribers* and their friends, need not be licensed. *Bellis* v. *Burghall*, 2 Esp. 722. Kenyon, C. J. 1799.

27. But the penalty attaches if money be taken at the door, though the defendant, the occupier of the house, have no share in the profits. *Archer* v. *Willingrice*, 4 Esp. 186. Ellenborough, C. J. 1802.

28. The penalty under 25 Geo. III. cap. 36. is not incurred by a person who merely allows a room in his house to be used for the purpose of dancing, during a particular festival. *Shutt* v. *Lewis*, 5 Esp. 128. Ellenborough, C. J. 1804.

A. (g) 32 *Geo. II. cap.* 28. *(Lords' Act.)*

29. In an action against a sheriff's officer, for the penalty incurred by taking an excessive fee upon an arrest, the plaintiff must prove that a table of fees has been made out in pursuance of the statute, 32 Geo. II. cap. 28. s. 2. *Jaques* v. *Whitcomb et alt.* 1 Esp. 361. Kenyon, C. J. 1795.

30. S. P. ruled in *Hannam* v. *Ormerod*, 1 Esp. 362, n. Macdonald, C. B. Maidstone, 1795.

S. P. *Martin* v. *Slade*, 2 N. R. 59.

31. In action against a bailiff for extortion, if the plaintiff fail upon the counts for the penalties, he may recover the excessive payment under a count for money had and received. *Lovell* v. *Simpson*, 3 Esp. 153. Kenyon, C. J. 1800.

Sed vide *Martin* v. *Slade*, 2 N. R. 59.

A. (h) 14 *Geo. III. cap.* 49, *sect.* 1, 32.

32. The superintendent of an unlicensed mad-house is liable to the penalties of 500l. though merely a servant. *Budd* v. *Mary Foulks*, 3 Campb. 404. Ellenborough, C. J. 1813.

33. To prove the plaintiff treasurer to the college of physicians, it is sufficient to produce the annals of the *comitia majora* recording his appoint-

ment, and to prove that he has since acted as treasurer. *Ibid.*

A. (i) 14 *Geo. III. cap.* 78. *sect.* 67.

34. The penalty on every master-workman, or other person who builds, *or causes to be built*, any house, &c. without giving notice to the surveyor of the district, does not attach upon a person who is merely the *proprietor of the house*. *Meymot* v. *Southgate*, 3 Esp. 223. Kenyon, C. J. 1800.

A. (k) 22 *Geo. III. cap.* 47.

(And see ante, ASSUMPSIT, pl. 92, 93; post. pl. 47, 8, 9, 50.)

35. Only one penalty is incurred by insuring several lottery tickets at *one* time. *Holland, qui tam* v. *Duffin*, Peake, 58. Kenyon, C. J. 1791.

36. But where the insurances are effected at different times, though on the same day, distinct penalties attach. *Ibid.*

Acc. *Brook* v. *Milliken*, 3 T. R. 509. And see GAME, A. (a) 3.

37. The plaintiff can, however, recover no more penalties than are included in the affidavit to hold to bail. *Phillips, qui tam* v. *Mendez da Costa*, 1 Esp. 34. Kenyon, C. J. 1793.

A. (l) 28 *Geo. III. cap.* 52.

38. In an action for the costs of a frivolous petition against the election of a member of parliament, the defendant's subscription to the petition need not be proved. *Cleveland, esq.* v. *Wilson, esq.* Peake, 106. Kenyon, C. J. 1792.

See the act, sect. 1, 20.

39. It was also ruled, that no demand of the costs need be proved. *Ibid.*

Sed vide sect. 23.

A. (m) 29 *Geo. III. cap.* 20. *sect.* 13.

40. A hawker who delivers his licence to his servant to enable the latter to sell his goods, upon which the servant receives a commission, does not incur the penalty of 40l. as for *letting out to hire*, or *lending* the licence. *Hodgson, qui tam* v. *Flower*, 2 Campb. 288. Ellenborough, C. J. 1809.

41. And the case is not within the statute. *Chamberlain qui tam* v. *Hill*, 2 Campb. 292, n. Exchequer, H. T. 1804.

42. But the servant might perhaps be liable to the penalties for trading *without* a licence, or *under colour of a licence granted to another*. *Hodgson* v. *Flower*, *ubi supra*.

A. (n) 37 *Geo. III. cap.* 73.

43. In an action against a master of a vessel for hiring a deserter from another ship, if articles were signed they must be produced; the prior engagement cannot be proved by the parol testimony of the deserter. *Martin qui tam* v. *Greenleaf*, 2 Esp. 729. Kenyon, C. J. 1799.

A. (o) 38 *Geo. III. cap.* 71. *sect.* 2.

44. The mere *selling* of a pirated bust, which has some addition to or diminution from the original, is not within the statute. *Gahagan* v. *Cooper*, 3 Campb. 111. Ellenborough, C. J. 1811.

45. And *semble*, that from the incautious manner in which this section is framed, no action can be maintained against the *maker* of a pirated cast, which is a perfect copy of the original. *Ibid.*

A. (p) 49 *Geo. III. cap.* 126. *s.* 6.

46. A declaration alleges that the defendant advertised a proposal for a promise to give, &c. to any one who would procure A. B. a place under government: the advertisement is, in fact, for a proposal to receive a promise. The words "for a promise" are surplusage: the words "under government" are sufficient, though the language of the statute is "office in the gift of the crown." *Clarke* v. *Harvey*, 1 Stark. 92. Ellenborough, C. J. 1815.

B. PLEADINGS.

47. On a declaration for penalties incurred by insuring "in a certain Irish lottery, *established by a certain Irish act of parliament*," the Irish act, though unnecessarily stated, must be proved.

Williams, qui tam v. *Pulley*, Peake, 51. Kenyon, C. J. 1791.

And see ante, ABATEMENT, pl. 7; BILLS AND NOTES, pl, 320, 325; Doctr. Plac. 463; *Peppin* v. *Solomons*, 5 T. R. 496; *Williamson* v. *Allison*, 2 East, 446; *R.* v. *Stevens*, 5 East, 244; 1 Smith, 447. S. C.

48. And the defendant is not estopped by the circumstance of his having effected the insurance. *Ibid.*

49. Declaration *qui tam*, for insuring a particular lottery ticket at 42l.; proof, that this sum was paid as the premium for insuring that ticket *and others*; the variance is fatal. *Phillips, qui tam*, v. *Mendez da Costa*, 1 Esp. 59. Kenyon, C. J. 1793.

50. Declaration, for insuring a lottery ticket, without mentioning any premium; proof, that the ticket was insured at a certain premium; this is no variance. *Ibid.*

51. Plaintiff declares for a penalty for a fraud in the measure of coals purchased by A. and B. The contract of sale appears to have been made between the defendant and A. B. *and C.* who agreed to divide the quantity between them. The variance in the description of the contract is fatal, though a separate delivery was made to A. and B. of their share. *Parish, qui tam* v. *Burwood et alt.* 5 Esp. 33. Ellenborough, C. J. 1803.

52. S. P. ruled in *Everett, qui tam* v. *Tindall*, 5 Esp. 169. Ellenborough, C. J. 1804.

(And see post. VENDOR AND PURCHASER, A (a); 47 Geo. III. stat. 2, cap. 68.)

53. The offence of driving a distress out of the hundred is not complete until the cattle have entered the second hundred. Therefore, if the latter be situated in a different county, the venue must be laid there, or the plaintiff will be non-suited under 21 Jac. 1. cap. 4. s. 1. *Pope, qui tam* v. *Davies*, 2 Campb. 266. Ellenborough, C. J. Maidstone, 1809.

And see *Platt* v. *Lokke*, Plowd. 35; Sav. 58. pl. 125.

C. EVIDENCE.

54. The writ may be produced to shew that the action was brought within the year, as well after as before the defendant has taken the objection. *Maugham, qui tam* v. *Walker*, Peake, 163. Kenyon, C. J. 1792.

PENALTY.

55. Held, that in assumpsit on an agreement to serve under a penalty of 50l. the jury are to give the real damages sustained, if they fall short of 50l. but that they can in no case exceed that sum. *Wilbeam* v. *Ashton*, 1 Campb. 78. Ellenborough, C. J. 1807.

Sed vide *Winter* v. *Trimmer*, 1 Bla. 395; *Harrison* v. *Wright*, 13 East, 343, 7.

See also *Astley* v. *Weldon*, 2 Bos. & Pul. 346; *Smith* v. *Dickenson*, 3 Bos. & Pul. 630; *Clarke* v. *Gray*, 6 East, 564; S. C. 2 Smith, 622, 630.

56. Where the performance of an agreement for acts not consisting in the payment of money is enforced by a stipulation for the payment of 500l. to be considered as liquidated damages, or sum of money forfeited or due from the party who shall neglect, &c. the jury are bound to give the whole 500l. *Barton* v. *Glover*, Holt, 43. Gibbs, C. J. 1815.

57. So on a bond conditioned for the payment of 1000l. in case the obligor resumes the business of a carrier. *Baker* v. *Webb*, MSS. Burrough, J. Bridgwater, 1817.

PERJURY.

(And see ACTION ON THE CASE, A. (g); B. (f).

A. WHAT SHALL BE.

B. PLEADINGS.

(a) *Form of indictment.*

(b) *Variance.*

C. EVIDENCE.

D. REMEDY OF PARTY GRIEVED.

A. What shall be.

1. Perjury cannot be assigned upon an assertion, the correctness of which depends on the construction of a deed. *Rex* v. *Crespigny*, 1 Esp. 280. Kenyon, C. J. 1795.

2. False testimony given at a trial upon an erroneous record is not perjury. *Rex* v. *Cohen*, 1 Stark. 511. Ellenborough, C. J. 1816.

3. A. advances money to B. on two distinct mortgages, upon one of which the security is insufficient. B. assigns the equity of redemption in both to C.; who assigns the insufficient estate to an insolvent, and files a bill against A. to redeem the other. A. in his answer denies having had notice of the assignment to the insolvent. The notice is a material fact, upon which perjury may be assigned. *Rex* v. *Pepys*, Peake, 138. Kenyon, C. J. 1792.

B. Pleadings.

B. (a) *Form of Indictment.*

4. An indictment for perjury, stating a bill of Middlesex, as "issuing out of the office of the chief clerk, assigned to inrol pleas in the court, &c." is bad. *Rex* v. *Michael Schoole*, Peake, 112. Kenyon, C. J. 1792.

And see Cro. Circ. Companion, 339, 356.

5. In an indictment for perjury, it is sufficient to state, that the defendant was *duly* sworn. *Rex* v. *M'Carther*, Peake, 155. Kenyon, C. J. 1792.

B. (b) *Variance.*

6. Where it is averred that the defendant was *sworn on the gospels*, and he appears to have been sworn according to the custom of his own country, without kissing the book, the variance is fatal. *Rex* v. *M'Carther*, *ubi supra*.

7. But if it appear that he was *previously* sworn in the ordinary mode, the averment is proved. *Ibid.*

8. Where the indictment misrecites the judgment roll of the cause, at the trial of which the perjury is alleged to have been committed, the variance is fatal. *The King* v. *Eden*, 1 Esp. 97. Kenyon, C. J. 1794.

9. In an indictment for perjury before a select committee, it was averred, that the election was held by virtue of a certain precept of the [illegible]h sheriff, by him duly issued to the bailiff of the borough of New Malton. Held, that this was not matter of description, and that the production of a precept, which in fact issued to the bailiff of the borough of New Malton, though directed "to the bailiff of the borough of Malton," was sufficient. *Rex* v. *Leefe, gent, one, &c.* 2 Campb. 139. Ellenborough, C. J. 1808.

And see *Purcell* v. *Macnamara*, 9 East, 157.

10. But the indictment stating that "A. and B. *were returned* to serve as burgesses to the borough of N. M." this was considered as a description of the indenture of return; and it appearing that the borough was therein described as "the borough of M." the variance was held fatal. *Ibid.*

See 1 Lord Raym. 701, *Roberts* v. *Price et alt*; 13 East, 547, *Judge* v. *Morgan*.

11. An allegation that F. C. A. exhibited his bill, is supported by the production of a bill purporting that I. C. A. was complainant, and proof that it was in fact exhibited by F. C. A. *Rex* v. *Roper*, 1 Stark. 518. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.* 520.

12. And after such proof, an allegation of an answer by the defendant to a bill exhibited by F. C. A. is supported by the production of an answer entitled, the answer of R. R. to the bill of complaint of I. C. A. *Ibid.* 518.

And the court discharged a rule granted for a new trial on this ground. *Ibid.* 531.

13. Where the allegation of the filing of a bill in equity, setting out such parts as are necessary, concludes "as appears by the said bill, &c. filed of record," the prout patet refers to the last antecedent, and not to the introductory allegation that F. C. A. exhibited his bill. *Ibid.* 518.

And the court refused a rule for a new trial on this ground. *Ibid.* 521.

C. Evidence.

(And see post, Variance.)

14. On an indictment for perjury, in an answer to an *allegation* exhibited before a surrogate, it is *primâ facie* sufficient to prove that he has generally acted in that capacity. *Rex* v. *Verelst, esq*. 3 Campb. 432. Ellenborough, C. J. 1813.

15. But if it be shewn that the surrogate was irregularly appointed, the defendant must be acquitted. *Ibid.*

16. If an indictment undertake to set out continuously the substance of what the defendant swore upon his examination, it must be proved that *in substance* he swore the whole of what is so set out, though several distinct assignments of perjury are made thereon. *Rex* v. *Leefe, gent.* 2 Campb. 134. Ellenborough, C. J. 1809.

N. In *Regina* v. *Rhodes*, 2 Ld. Raym. 886, 7, where there appears to have been only one count, it was held, that although all the assignments of perjury but one were bad, judgment should not be arrested. And see *Compagnon et ux.* v. *Martin*, 2 Bla. 790.

17. Upon an indictment for perjury, committed at the trial of a cause, the prosecutor must prove the *whole* of the defendant's testimony. *The King* v. *Jones*, Peake, 37, 8. Kenyon, C. J. 1791.

18. Unless the perjury be assigned upon a point which first arose upon the defendant's cross examination; in which case, proof of the whole cross examination is sufficient. *Rex* v. *Dowlin*, Peake, 170. Kenyon, C. J. 1793.

S. C. not S. P. 5 T. R. 311.

19. It is no objection to the competency of a witness on an indictment for perjury committed in an answer in chancery that in his answer to a cross bill he has sworn to the same fact which he is now called to prove. *Rex* v. *Pepys*, Peake, 138. Kenyon, C. J. 1792.

20. Held that a defendant who has not paid debt and costs, though his bail are fixed, is not competent to prove perjury committed at the trial of his cause. *The King* v. *Eden*, 1 Esp. 97. Kenyon, C. J. 1794.

Sed vide *Bartlet* v. *Pickersgill*, 4 Burr. 2255; *Smith* v. *Prager*, 7 T. R. 60.

21. On an indictment for perjury in an answer in chancery, proof of the defendant's signature, and of that of the master before whom the answer purports to be sworn, is evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat. *Rex* v. *Wm. Benson*, 2 Campb. 508. Ellenborough, C. J. 1810.

And see *Rex* v. *Morris*, 2 Burr. 1189; S. C. Leach, Crown Cases; S. C. Bull. N. P. 239; and 1 Shower, 190, 335, 397.

22. *Semble*, that on an indictment for perjury committed by a bankrupt in passing his last examination, it is necessary to go into strict proof of the bankruptcy. *Rex* v. *Punshon*, 3 Campb. 96. Ellenborough, C. J. 1811.

23. But on an indictment against a third person examined before the commissioners, their declaration that the party is a bankrupt is sufficient. *Rex* v. *Raphael*. Abbott, J. Devon Spring Assizes, 1818.

24. The clause in 5 Geo. II. cap. 30. § 16. authorizing commissioners *to examine*, enables them to administer on oath, and is sufficient to found an indictment for perjury. *Ibid.*

25. A doubt arising as to the way in which the instrument produced is to be read (as whether a word is meant for "mutiny" or meeting) is to be decided by the court upon inspection, and not by the jury. *Rex* v. *Hucks*, 1 Stark. 521. Ellenborough, C. J. 1816.

26. The day on which a bill, upon the answer to which the perjury is assigned, was filed, is immaterial. *Ibid.*

27. "Whereas in truth and in fact defendant, at the time of effecting the said policy, to wit a certain policy of insurance, *purporting* to have been underwritten on 13th August, well knew, &c." The subscription was dated 15th August. The variance is fatal. *Ibid.*

D. Remedy of party grieved.

(And see ante, Action on the case, A. (g).

28. The party injured by the perjury of a witness, is not obliged to proceed

by indictment; he may maintain an action on the case for damages. *Amey* v. *Long*, 1 Campb. 16. Ellenborough, C. J. 1807.

PHYSICIAN.

(And see ante, ACTION ON THE CASE, pl. 3; BAILMENT, pl. 3: EVIDENCE, pl. 110; PAUPER; PENAL ACTION A (h); post, VARIANCE.)

A. REMEDIES OF MEDICAL MEN FOR THEIR SERVICES.

B. LIABILITY OF MEDICAL MEN.

C. EXEMPTION FROM OFFICES.

D. EXPOSITION OF PARTICULAR WORDS USED IN STATUTES.

A. REMEDIES OF MEDICAL MEN FOR THEIR SERVICES.

1. If a medical practitioner write prescriptions, and designate himself M. D. he cannot maintain an action for work and labour as a surgeon, and for curing diseases, although he have no diploma, and no right to assume the character of a physician. *Lipscombe* v. *Holmes*, 2 Campb. 441. Ellenborough, C. J. 1810.

And see *Chorley* v. *Bolcott*, 4 T. R. 317; ante, BARRISTER; post. pl. 8. Vide tamen *Brown* v. *Cary*, Litt. Ent. 25.

2. But if the defendant pay money into court generally, he admits plaintiff's right to sue in that capacity. *Ibid.*

And see 1 Saund. 33, c.; post, PRACTICE.

3. A count for work and materials will cover a demand for attendances as a farrier, and for medicines administered. *Clark* v. *Mumford*, 3 Campb. 37. Ellenborough, C. J. 1811.

Acc. *Wood* v. *Grace*, Barnes, 344.

4. Where a surgeon, in making out his bill, leaves a blank for attendances, and the patient pays money into court on that account, nothing further can be recovered. *Tuson* v. *Batting*, 3 Esp. 192. Kenyon, C. J. 1800.

5. An apothecary who has unskilfully and improperly treated his patient, is not entitled to recover any thing for the medicines which he has administered. *Kannen* v. *M'Mullen*, Peake, 59. Kenyon, C. J. 1791.

And see *Templer* v. *M'Lachlan*, 2 N. R. 136.

6. But where medicines are administered under the direction of a physician, the apothecary is not responsible. *Ibid.*

And see ante, BAILMENT, pl. 3.

7. Where a personal injury has been occasioned by the wrongful act of the defendant, the amount of the surgeon's bill, although not paid, forms part of the damages to be assessed. *Dixon* v. *Bell*, 1 Stark. 287. Ellenborough, C. J. 1816.

8. But physician's fees are not chargeable unless actually paid, the physician having no legal demand against his patient. *Ibid.*

9. By 3 Hen. 8. cap 11. s. 1. it is enacted, that no one shall practice as a surgeon in London, &c. without being examined and admitted by the college of surgeons, under the penalty of 5l. per month. The 34 and 35 Hen. VIII. cap. 8. s. 3. after reciting that the company have sued skilful persons who practised *gratuitously*, gives liberty to persons having knowledge in herbs, &c. to administer, &c. As the latter statute contains no prohibitory clause, *semble*, that an unlicensed person may maintain an action for work done as a surgeon, within the limits mentioned in the former act. *Gremare* v. *Le Clerc Bois Valon*, 2 Campb. 144. Ellenborough, C. J. 1808.

And the court of K. B. discharged a rule for setting aside a verdict for the plaintiff, the defendant not having proved that the plaintiff had *not* obtained a regular licence. *Ibid.*

And see Rastall, 463. b. pl. 4; Rob. Ent. 414; Ast. pl. 81.

B. LIABILITY OF MEDICAL MEN.

(And see ante, pl. 4, 5.)

10. An action lies for brokerage in procuring a medical partnership for defendant. *Edgar* v. *Blick*, 1 Stark. 464. Ellenborough, C. J. 1816.

And see *Farr* v. *Pearce*, 3 Madd. 74.

C. EXEMPTION FROM OFFICES.

11. A member of the Barbers' Company in London, not examined and approved as a surgeon, under 3 H. VIII. cap. 11. s. 2. and 3. cannot, under 5 Hen. VIII. cap. 6. claim an exemption from serving the office of constable. *Rex* v. *Chapple*, 3 Campb. 91. Ellenborough, C. J. 1811.

D. EXPOSITION OF PARTICULAR WORDS USED IN STATUTES.

12. The interpretation to be put upon the expression "*quick* with child," in 43 Geo. III. cap. 58. s. 1. is, that the fœtus has been felt by the woman to be alive within her. Goldsmith's case, 3 Campb. 76. Lawrence, J. Gloucester, 1811.

PLEADING.

A. DECLARATION,

(a) *Title.*

(b) *Profert.*

(c) *Necessary averments.*

B. GENERAL ISSUE.

(a) *Nil debet.*

(b) *Non est factum.*

(c) *Non assumpsit.*

(d) *Not guilty.*

C. PRESCRIPTION.

D. REPLICATION.

(a) *In what cases special.*

E. NEW ASSIGNMENT.

(a) *In what cases necessary.*

(b) *How proved.*

F. PLEAS PUIS DARREIN CONTINUANCE.

A. DECLARATION.

(And see ante, ATTORNEY, pl. 4.)

A. (a) *Title.*

1. *Semble*, that where the declaration is not specially entitled, the defendant cannot give in evidence a tender made after the first day of term, though he be prepared to shew that the latitat was sued out after the tender. *Rolfe* v. *Norden*, 4 Esp. 72. Le Blanc, J. 1801.

Sed vide *Tatlow* v. *Batement*, 2 Lev. 13; *Foster* v. *Bonner*, Cowper, 454, 6.

N. Under such circumstances the defendant should apply to the court to oblige the plaintiff to entitle his declaration properly. *Smith* v. *Key*, 1 Stra. 638; *Winter* v. *Moren*, Selw. 152; *Southouse* v. *Allen*, *ibid.* and Ca. Temp. Hardw. 141.

2. Where a declaration is entitled generally, and the trespasses complained of were committed after the first day of term, the writ may be produced to shew that it was issued after the cause of action had accrued. *Rhodes* v. Gibbs, 5 Esp. 163. Heath, J. Surry, 1804.

Acc. 1 Saund. 1 n. (1); Tidd.

A. (b) *Profert.*

3. To excuse the profert of a deed pleaded as *lost or mislaid*, it must be shewn, that due search has been made. *Beckford* v. *Jackson*, 1 Esp. 337. Kenyon, C. J. 1795.

4. If a deed, pleaded as lost by time and accident, be afterwards found, it may be given in evidence at the trial. *Hawley* v. *Peacock and another*, 2 Campb. 557. Ellenborough, C. J. 1811.

And see *Rootham* v. *Dawson*, 3 Anst. 859.

5. A judge at nisi prius will not, upon an *ex parte* application, allow an amendment of the record by substituting an excuse for profert. *Paine* v. *Bustin*, 1 Stark. 74. Ellenborough, C. J. 1815.

A. (c) *Necessary averments.*

(And see ante, AGREEMENT, pl. 37; BILLS AND NOTES, pl. 319, 320, 325; PENAL ACTION, pl. 45, 47, 48.)

6. Where by an agreement for a purchase an appraisement was appointed to be made on a day certain, which was afterwards postponed by consent, a declaration on the original agreement, without noticing the alteration, is good. *Thresh* v. *Rake*, 1 Esp. 53. Kenyon, C. J. 1793.

7. Where the defendant has disabled himself from performing his contract, the plaintiff need not aver the performance of conditions precedent. *Knight* v. *Crockford*, 1 Esp. 192. Eyre, C. J. 1794. And see APPENDIX.

8. In a declaration for not completing a purchase, the vendor need not set out a warranty contained in the particulars of sale, respecting a collateral matter. But such warranty must, at the trial, be shewn to have been complied with. *Thompson* v. *Miles*, 1 Esp. 184. Kenyon, C. J. 1794.

9. In an action for words spoken of an attorney with reference to his conduct in the management of a former cause, the proceedings in that cause must be strictly proved. *Parry, gent.* v. *Collis*, 1 Esp. 399. Kenyon, C. J. 1795.

10. Where the proceedings in a former cause form the inducement to the action, such proceedings, or a copy of the roll, must be produced, though all the papers are in the hands of the defendant, who has had notice to produce them. *Ibid.*

11. So where the staying of proceedings in a former action forms part of the consideration of the defendant's promise. *Herbert* v. *Jones*, 1 Esp. 422. Eyre, C. J. 1795.

12. Although an objection be on the record, yet if it be of such a nature that the action clearly cannot be maintained, as in the case of the non-performance of a condition precedent, the judge will direct a nonsuit, and will not oblige the defendant to move in arrest of judgment, or bring a writ of error. *Sadler* v. *Robins*, 1 Campb. 256. Ellenborough, C. J. 1808.

13. So where it appears by the pleadings that an infant is sued as acceptor of a bill; *comme semble*. *Williamson* v. *Watts, spinster*, 1 Campb. 552. Mansfield, C. J. 1808.

14. In trespass *quare clausum fregit tali die et diversis aliis, &c.* the plaintiff may give in evidence any number of trespasses within the period specified; but if he proves a trespass anterior to the first day, he must confine himself to that one trespass. *Hume* v. *Oldacre*, 1 Stark. 351. Ellenborough, C. J. 1816.

15. In trespass and false imprisonment, if the consequent sickness of the plaintiff be not laid under a *per quod*, he cannot give it in evidence. *Pettit* v. *Addington, esq.* Peake, 62. Kenyon, C. J. 1791.

16. No proof of special damage in the loss of lodgers is admissible, unless the names of such lodgers be stated in the declaration. *Westwood* v. *Cowne*, 1 Stark. 172. Ellenborough, C. J. 1811. And see *Hartley* v. *Herring*, 8 T. R. 130; [illegible] v. *Dixe*. 1 Roll. Abr. 58; 1 Vin. A[illegible]469; Bull. N. P. 7: 2 Wms. Saund. 411 n. (4).

17. A declaration *qui tam* for penalties for acting as a magistrate not being qualified, without averment of any specific act, was held to be cured by verdict: aliter in the case of an indictment. *Wright, qui tam.* v. *Horton*, 1 Stark. 400. K. B. M. T. 1816.

18. The *alia enormia* is no part of the declaration; and no facts can be given in evidence under it which could have been put upon the record, except where they could not, consistently with decency, have been stated. *Lowden* v. *Goodrick*, Peake, 46. Kenyon, C. J. 1791.

As to the last point, see *Bassett* v. *Shippon*, 1 Keb. 787; S. C. 1 Siderf. 225; *Russell* v. *Corn*, 6 Mod. 127; *Dix* v. *Brookes*, 1 Stra. 61; *Watson* v. *Norbury*, Style, 202; 12 Vin. Abr. Evidence, (Tb. 6); *Ash* v. *Ash*, Comb. 357, 8.

B. GENERAL ISSUE.

(And see ante, LICENCE, pl. n.; post, SET OFF, pl. .)

B. (a) *Nil debet.*

19. To debt on bail bond, *nil debet* is no plea. *Rawlins and another, sheriff of Middlesex*, v. *Danvers*, 5 Esp. 38. Ellenborough, C. J. 1803.

And see 1 Saund. 187, a.; *Smith* v. *Whitbread*, cited in *Warren* v. *Consett*, 2 Strange, 780, and 2 Lord Raym. 1503; *Hart* v. *Weston*, 5 Burr. 2586; S. C. 2 Bla. 683; *Wilson* v. ——, Hardres, 332; Anon. 2 Wils. 10; *Mill* v. *Bond*. Fort. 363; *Maighen* v. *Maighen*, *ibid.* 367; Anon, Sl. nn. 17.

20. But if, instead of demurring, the plaintiff join issue and go to trial, the defendant may set up any defence he thinks proper. *Ibid.*

B, (b) *Non est factum.*

(And see COVENANT, C.; SET OFF.

21. Under this plea coverture may be given in evidence. *Lambert* v. *Martha Atkins and another*, 2 Campb. 272. Ellenborough, C. J. 1809.

Acc. *Cole* v. *Delawn*, 3 Keb. 228; Anon, 12 Mod. 609.

22. Though defendant has brought actions as a feme sole. *Davenport* v. *Nelson*, 4 Campb. 26. Ellenborough, C. J. 1814.

23. So lunacy. *Silk* v. *Faulder*, 3 Campb. 126; reported more fully, 1 Collinson, 390. Ellenborough, C. J. 1811.

24. Or delivery as an *escrow*. *Stoytes* v. *Pearson*, 4 Esp. 255. Ellenborough, C. J. 1805.

S. P. *Coles* v. *Robbins*, Bull. N. P. 172; *Bushell* v. *Pasmore*, 6 Mod. 217. And see Savile, 71, pl. 148.

N. As to the propriety of pleading, *issint non est factum*, see Moore 43, pl. 131. MSS. D. 210, 1.

25. On *non est factum* pleaded, it is not sufficient to prove that a person executed the deed as party, without establishing his identity. *Parkins* v. *Hawkshaw*, 2 Stark. 239. Holroyd, J. 1817.

And see ante, EJECTMENT, pl. 18.

26. On *non est factum* the defendant must be identified with the party executing the deed. *Middleton*, v. *Sandford*, 4 Campb. 34. Dampier, J. 1814.

27. It is not sufficient to shew it executed by a person in his name. *Ibid.*

28. Though it is irregular to sue in the superior courts on a bond for appearance in the palace court, the objection cannot be taken under a plea of *non est factum*. *Wright* v. *Walmsley*, 2 Campb, 396. Ellenborough, C. J. 1810.

And see 1 Burr. 642; 3 Burr. 1923; *Morris* v. *Rees*, 2 Bla. 838, 3 Wils. 348; 8 T. R. 152; Barnes, 92, 117. But see 2 Wms. Saund. 61 a; 1 H. Bla. 631.

29. *Semble*, that the irregularity may be specially pleaded, or be made the subject of an application to stay the proceedings. *Ibid.*

30. Where a declaration omits a proviso, which goes in defeasance of the covenant declared on, the defendant must have oyer and demur. He cannot take advantage of the omission upon *non est factum*. *Gordon* v. *Gordon*, 1 Stark. 294. Ellenborough, C. J. 1816.

31. Under *non est factum* the defendant cannot give evidence that he was induced to execute the instrument by a fraudulent representation. *Hamilton* v. *Stratton*. Abbott, C. J. Sittings at Westminster after T. Term, 9 July, 1819.

32. Or that the consideration was illegal, even at common law. *Harmer* v. *Wright*, 2 Stark. 35. Ellenborough, C. J. 1817.

B. (c) *Non assumpsit.*

(And see ante, AGREEMENT, A. (a) pl. 6; BARON AND FEME, B. (c) pl. 53.)

33. It appears to be stated to have been the opinion of Lord Kenyon that, under this plea, payment after issue joined might be given in evidence. *Storey* v. *Bloxam*, 2 Esp. 504. Kenyon, C. J.

34. It has since, however, been held, that payment after action brought is merely a ground for application to the court, and is no defence at the trial. *Atkinson* v. *Thornton*, 1 Camp. 559, n. Ellenborough, C. J. 1808.

S. P. *Toms* v. *Powell*, 7 East, 536; S. C. 3 Smith, 554.

Quære tamen, whether such payment might not be pleaded *in barram ulterior. manutention. action.* if made before plea; Lutw. 1177; *Thomlinson* v. *Arriskin*, 1 Com. Rep. 328; *Le Bret* v. *Papillon*, 4 East, 502; or *puis darrein continuance*, if made after.

35. In an action by indorsee against acceptor, an act of bankruptcy committed by the payee before indorsement is a good defence. *Pinkerton* v. *Adams and Milner*, 2 Esp. 611. Kenyon, C. J. 1797.

S. P. admit: *Arden* v. *Watkins*, 3 East, 322, 3.

36. A *release* may be given in evidence upon this issue. *Miller* v. *Aris*, 3 Esp. 231. Kenyon, C. J. 1800.

S. C. Selw. 111.

37. S. P. ruled in *Hawley* v. *Peacock and another*, 2 Campb. 557. Ellenborough, C. J. 1811.

And see *Sullivan* v. *Matthews*, Dougl. 110; Gilb. C. P. 14.

38. The plaintiff may, however, shew that it was obtained by fraud. *Miller* v. *Aris, ubi supra.*

Vide tamen *Rowntree* v. *Jacob*, 2 Taunt. 141; Sav. 17, pl. 45.

39. But a release after issue joined must be pleaded *puis darrein continuance. Storey* v. *Bloxam, ubi supra.*

40. So an award; *comme semble. Ibid.*

And see *Thomlinson* v. *Arriskin*, 1 Com. Rep. 328; *Freeman* v. *Bernard*, 1 Lord Raym. 248.

41. It is no defence that policies of insurance have been deposited with the plaintiff, by way of collateral security, upon which arbitrators have awarded a certain sum to be due. *Scott and others* v. *Lifford*, 1 Campb. 246. Ellenborough, C. J. 1808.

42. But if the amount had been actually paid, it would have been a discharge *pro tanto. Ibid.*

S. C. not S. P. 9 East, 347.

43. In assumpsit upon an express promise to the mother of a bastard child to pay for its maintenance, it is no defence that the defendant has since discovered that the child is not his. *Shaw* v. *Whiteman*, Peake, 29. Kenyon, C. J. 1791.

44. Payment by bills is *primâ facie* an answer to a money demand, without shewing that such bills were discharged. *Hebden* v. *Hartsink*, 4 Esp. 46. Kenyon, C. J. 1801.

And see ante, INSURANCE, pl. 1.

B. (d) *Not guilty.*

45. Under this issue an executor need not prove his right to sue in that capacity. *Loyd, executrix*, v. *Finlayson*, 2 Esp. 564. Kenyon, C. J. 1797.

And see *Cheeseborough* v. *Linton*, Skinn. 551; APPENDIX.

46. Held, that in trespass *quare clausum fregit*, defendant cannot, under the general issue, prove title in a third person, and a command from him to enter. *Philpot* v. *Holmes*, Peake, 67. Kenyon, C. J. 1791.

S. P. contra, *Argent* v. *Durrant*, 8 T. R. 403, 5.

And see *Graham* v. *Peat*, 1 East, 244; *Chambers* v. *Donaldson*, 11 East, 72.

47. A party distraining off the demised premises, under 11 Geo. II. cap. 19. s. 1., is not entitled, by s. 21. to give the special matter in evidence under the general issue. *Vaughan* v. *Davis*, 1 Esp. 257. Rooke, J. 1794.

48. S. P. *Furneaux* v. *Fotherby and Clarke*, 4 Campb. 136. Ellenborough, C. J. 1815.

49. An executed agreement to destroy letters containing proofs of the crime imputed, is a good defence under the general issue. *Lane* v. *Applegate*, 1 Stark. 97. Ellenborough, C. J. 1815.

50. In trespass for unmooring the plaintiff's barges, the defendant cannot, under the general issue, shew an authority from the plaintiff. *Milman* v. *Dolwell*, 2 Campb. 378. Ellenborough, C. J. 1810.

As to such justification, see Com. Dig. Pleader, 3 M. 31, 38, 39. And see ante, LICENCE; post, D. (a), pl. 53.

And the court of K. B. refused a new trial, moved for on the ground that evidence of the special defence had been improperly rejected, and that the action should have been case and not trespass. *Ibid.*

51. In trespass for driving the cart against the plaintiff's chaise and killing his horse, the defendant should plead specially that the injury arose from the negligence of the plaintiff, or by mere accident, without the defendant's fault; under the general issue the cause of the accident would be immaterial. *Knapp* v. *Salsbury*, 2 Campb. 500. Ellenborough, C. J. 1810.

And as to such special pleas, see Latch, 13; Com. Dig. Pleader, 3 M. 31.

C. PRESCRIPTION.

52. Issue upon a prescription for a several fishery in *four* places in a navigable river. It appeared that the right extended to *two* of the places only, in one of which the trespasses had been committed. It was ruled, that the trespasses not having been committed in the excepted places, the variance between the prescription and the evidence,

was immaterial. *Rogers and another* v. *Allen*, 1 Campb. 313. Heath, J. Chelmsford, 1808.

But the court of K. B. were clearly of opinion that the prescription was negatived by the evidence, and granted a new trial. *Ibid.*

And see 1 Saund. 268, n. 1. Ante, CUSTOM, 2.

D. REPLICATION.

D. (a) *In what cases special.*

53. Defendant justifies an entry upon the possession of his tenant, under a clause of re-entry in case an auction should be held on the premises. The plaintiff, admitting the demise, replies *de injuriâ, absque residuo causæ.* He cannot, under this general replication, give evidence of a waver of the forfeiture by the acceptance of rent after notice. *Warrall* v. *Clare*, 2 Campb. 629. Mansfield, C. J. 1811.

And see ante, pl. 50; LICENCE, 1.

E. NEW ASSIGNMENT.

E. (a) *In what cases necessary.*

(And see post. WITNESS, C.)

54. A. is in possession of a part of a house, and B. of the other part. An officer enters into A.'s part under a writ against B.'s goods, none being there. A. may maintain an action against the officer for entering *his house*, and need not make any new assignment to a justification under the writ against B. *Fallon* v. *Anderson*, Peake, 109. Kenyon, C. J. 1792.

55. Where upon an issue on *son assault demesne*, the defendant proves that he was assaulted before the day mentioned in the declaration, the plaintiff cannot give in evidence an assault on the day without new-assigning. *Randle* v. *Webb*, 1 Esp. 38. Buller, J. Chelmsford, 1793.

S. P. contra, *Thornton* v. *Lyster*, Cro. Car. 514. Sed vide Bull. N. P. 17; *Tyler* v. *Wall*, Cro. Car. 228; Anon. 2 Lord Raym. 1015. And see 2 Saund. 5. g.; *Barnes* v. *Hunt*, 11 East, 451; *Pyewell* v. *Stow*, 3 Taunt. 425; *Oakley* v. *Davis*, 16 East, 82.

56. Declaration for entering house and staying therein three weeks. Defendant justifies as to entering and staying 24 hours. The plea covers the whole, and the plaintiff must new-assign if he relies upon the excess. *Monprivatt* v. *Smith and another, sheriff of Middlesex*, 2 Campb. 175. Ellenborough, C. J. 1809.

And see *Bousfield* v. *Blois, bart. sheriff of Essex*, Serjeant's Inn, Sittings before M. T. 1818, reported in Manning's Exchequer Practice, 634.

E. (b) *How proved.*

57. Plea justifies cutting ropes as necessary for disengaging vessels which had run foul of each other. To support a new assignment of excess clear and wanton injury must be proved. *Hockless* v. *Mitchell*, 4 Esp. 86. Kenyon, C. J. 1801.

F. PLEAS PUIS DARREIN CONTINUANCE.

58. *Semble*, that an award made after issue joined, must be pleaded as *since the last continuance*. *Storey* v. *Bloxam*, 2 Esp. 504. Kenyon, C. J. 1796.

See *Thomlinson* v. *Arriskin*, 1 Com. Rep. 330, where an award post ult. cont. was pleaded in bar of the action generally. And see *Hawkins* v. *Colclough*, 1 Burr. 275; Brownl. Red. 181, 2; F. N. B. 181; Gilb. C. P. 101.

59. If that which is tendered as a plea *puis darrein continuance*, have the form and semblance of a plea, the judge will allow it to be put in and tacked to the nisi prius record. *Fitch* v. *Toulmin*, 1 Stark. 62. Ellenborough, C. J. 1815.

Acc. *Lovell* v. *Eastaff*, 3 T. R. 554; *Prince* v. *Nicholson*, 5 Taunt. 337; 1 Marsh. 70.

60. But the court will order a demurrer to such a plea to stand for the first paper day. *Ibid.*

POWER.

A. APPOINTMENT.

(a) *Form of instrument.*

B. LEASES.

(a) *Reservation.*

A. APPOINTMENT.

A. (a) *Form of instrument.*

1. A power to appoint by any writing, &c. signed, sealed, and *delivered* by J. B. in the presence of two or more witnesses, is well executed by a will signed and sealed by J. B. and then delivered over by him to a person then present. *Doe* d. *Delegal and others* v. *Holloway*, 1 Stark. 481. Ellenborough, C. J. 1816.

B. LEASES.

B. (a) *Reservation.*

2. Where tenant for life with power to grant leases, reserving the best rent, makes a lease reserving a less rent, the lease is not merely voidable, but void; and it cannot be confirmed by the acceptance of rent by the remainder man. *Doe* d. *Martin et alt.* v. *Watts*, 2 Esp. 501. Hotham, B. Guildford, 1796.

3. But the acceptance of rent by the remainder-man creating a tenancy from year to year, he cannot maintain ejectment without notice to quit. *Ibid.*

And the court of K. B. discharged a rule for setting aside nonsuit. 7 T. R. 83.

4. A., being in possession, grants a term to B., who, by a decree of the court of chancery, is directed to attorn to C.; B. attorns, and C. accepts rent from him. C. is bound by the lease. *Doe* d. *Jolliffe, J. Jolliffe & W. Bowerman*, v. *Sybourn*, 2 Esp. 577. Kenyon, C. J. Maidstone, 1798.

S. C. not S. P. 7 T. R. 2.

5. A demise of lands at an entire rent void for part, is void for the whole. *Doe* d. *Griffiths* v. *Lloyd*, 3 Esp. 78. Kenyon, C. J. 1800.

6. Where tenant for life, bound to reserve the best rent, lets the premises on a repairing lease, and after the improvements have taken place, accepts a surrender and grants a fresh term, he must reserve the best rent that can be *then* obtained. *Ibid.*

7. But equity may relieve for the part of the former term remaining unexpired at the period of the surrender. *Ibid.*

8. Under a power to grant leases for 21 years, "so as upon every such lease there shall be reserved the best improved rent that can reasonably be had for the same," a lease by tenant for life, reserving a larger rent than had been paid to the devisor, but which was found by special verdict not to be the best rent which could have been fairly obtained, though there was no fraud or collusion, was determined to be void. *Wright* v. *Smith*, 5 Esp. 203. Exchequer, M. T. 1803.

PRACTICE.

A. COMMENCEMENT OF ACTION.

B. PARTICULARS OF DEMAND.

(*a*) *In what case requirable.*

(*b*) *Where sufficient.*

C. PAYMENT OF MONEY INTO COURT.

(a) *In what cases allowed.*

(b) *Effect of.*

D. ORDER FOR PRODUCTION OF PAPERS.

E. NOTICES.

F. CONSENT-RULE.

G. ENTERING THE RECORD.

H. PUTTING OFF TRIAL.

I. WITHDRAWING THE RECORD.

K. NONSUIT.

L. JUDGMENT AS IN CASE OF A NONSUIT.

M. TRIAL.

(a) *In what county.*

(b) *Attendance and demeanour of parties.*
(c) *Particular defences, where excluded.*
(d) *Jury.*
(e) *Counsel.*

N. New trial.

A. Commencement of action.

(And see Penal action, pl. 54.)

1. The filing of the bill is the commencement of an action against an attorney; and payment after bill filed, though before notice, is insufficient. *Goddard and another* v. *Benjamin, one, &c.*, 3 Campb. 331. Ellenborough, C. J. 1813.

2. And where the hour on which the bill was filed is shewn, the production of a receipt, bearing date the same day, is no bar, without proof that the money was paid before that hour. *Ibid.*

B. Particular of demand.

B. (a) *In what cases requirable.*

3. In an action for the recovery of the deposit paid on the purchase of an estate, the vendor is entitled to a statement of the objections of the vendee. *Squire* v. *Tod and others*, 1 Campb. 293. Mansfield, C. J. 1808.

B. (b) *Where sufficient.*

4. Where there has been an account current between the parties, the particular should specify the matters for which credit is meant to be given. *Mitchell* v. *Wright*, 1 Esp. 280. Kenyon, C. J. 1795.

5. And stating the debtor side of the account only was declared to be a contempt, for which the attorney would be probably ordered to pay costs on both sides. *Adlington* v. *Appleton*, 2 Campb. 410. Ellenborough, C. J. 1810.

But Le Blanc, J. and Thompson, C. B. *(Whaley* v. *Banks,)* 1814, and Burrough, J. *(Pemberton* v. *Bellington)* 1816, refused to order the plaintiff to state the creditor side of the account.

And see *Lovat* v. *Lord Ranelagh*, 3 V. & B. 30; Mann. Exch. Pra. 214, 5.

6. Giving credit to the opposite party, is not an admission that the sum is due. *Miller* v. *Johnson*, 2 Esp. 602. Eyre, C. J. 1797.

7. A plaintiff is not precluded from recovering a demand included in his particular, by the circumstance of his having omitted to make such demand in a bill sent to the defendant before action brought. *Short* v. *Edwards*, 1 Esp. 374. Kenyon, C. J. 1795.

8. If the attorney upon being called upon for a particular, refer to an account delivered before the commencement of the action, this is a virtual compliance with the order, and the party is bound by the account. *Hatchet and wife* v. *Marshall*, Peake, 172. Kenyon, C. J. 1793.

And see *Etches* v. *Fellowes*, Wightw. 78.

9. The plaintiff's particular was for horses sold and on an account stated. The defendant paid money generally into court sufficient to cover the latter demand. The evidence to support the former shewed, that the defendant was liable only for the price of horses sold *by* him for the plaintiff. Held, that the plaintiff was precluded from recovering the money received to his use; and that he could not, by applying the money paid to the counts for horses sold, upon which he had given no evidence, entitle himself to a verdict on the account stated for the balance. *Holland* v. *Hopkins*, 3 Esp. 168. Eldon, C. J. 1800.

And the court of C. P. discharged a rule for setting aside nonsuit; but gave leave to amend on payment of costs. 2 Bos. and Pull. 243.

10. If the plaintiff, in his particular, demand money due on a promissory note only, which note appears to be on an improper stamp, he cannot resort to the money counts. *Wade* v. *Beasley*, 4 Esp. 7. Kenyon, C. J. 1801.

But see *Brown* v. *Hodgson*, 4 Taunt. 189.

11. If a payment made on account of the defendant to A. is stated in the plaintiff's particular to have been made to B., it is sufficient; unless the defendant will state to the court by affi-

davit, that he has been misled by the particular. *Day and others, assignees,* v. *Bower,* 1 Campb. 69, n. Ellenborough, C. J. 1806.

12. In an action against a factor for not accounting, and for goods sold, a bill of particulars, headed "A. to B." simply stating the quantity and value of the goods, is applicable to either count. *Hunter* v. *Welsh,* 1 Stark. 224. Ellenborough, C. J. 1816.

B. (c) *Effect of.*

13. If the plaintiff's particular contain items which are owing from the defendant and his partner, who is not sued, the nonjoinder may be pleaded in abatement, though part of the demand be due from the defendant solely. *Colson et alt.* v. *Selby,* 1 Esp. 452. Kenyon, C. J. 1796.

And the court refused a rule to set aside nonsuit. *Ibid.* and Tidd, 595.

14. Under a particular, specifying merely a demand on a promissory note, the plaintiff may recover interest. *Blake, executor of Dale,* v. *Lawrence,* 4 Esp. 147. Ellenborough, C. J. 1802.

15. Though the plaintiff is restricted in his own evidence to the contents of his particular, he may avail himself of any evidence produced by the defendant, to increase his demand. *Hurst* v. *Watkis,* 1 Campb. 68. Ellenborough, C. J. 1807.

But see Phill. Evid. 149; ante, LANDLORD and TENANT, pl. 15.

16. Payment of 5l. into court on a count for goods sold and delivered, after the delivery of a particular demanding the price of wool sold by the plaintiff's broker, is no admission of the plaintiff's interest in the goods beyond the 5l. *Blackburn* v. *Scholes and another,* 2 Campb. 341. Ellenborough, C. J. 1810.

17. Particular specified a bill for 60l. bearing date on a certain day. The evidence was of a bill of 63l. dated on a different day in the same year and month. The variance was held to be immaterial. *Dunn* v. *Thomas.* Abbott, J., Cornwall Spring Assizes, 1818.

C. PAYMENT OF MONEY INTO COURT.

C. (a) *In what cases allowed.*

(Quidam existimaverunt neque eum qui decem peteret, cogendum quinque accipere et reliqua persequi: neque eum qui fundum suum diceret, partem dumtaxat judicio persequi; sed in utrâque causâ humanius facturus videtur prætor, si actorem compulerit ad accipiendum id quod offeratur: cum ad officium ejus pertineat lites diminuere. D. 12, 1, 21.

And see post, SET OFF; TENDER; a defendant being at liberty to pay money into court in all cases in which a set off or a tender would have been available, that is, where the duty for which the action is brought consists of a sum certain, or of a demand capable of being reduced to a sum certain by simple calculation. Ante, BANKRUPT, pl. 99.)

C. (b) *Effect of.*

(See ante, INSURANCE, pl. 217; post, TENDER, E.)

18. Where the declaration contains a count upon a special contract, bringing in money *generally* is an admission of the contract. *Guillod* v. *Nock,* 1 Esp. 347. Eyre, C. J. 1795.

S. P. *Gutteridge* v. *Smith,* 2 H. Bla. 374; *Watkins* v. *Towers,* 2 T. R. 280; *Jenkins* v. *Tucker,* 1 H. Bla. 90; *Bennett* v. *Francis,* 2 Bos. & Pul. 550; *Muller* v. *Hartshorn,* 3 Bos. & Pul. 556; *Bryan* v. *Williamson,* Tidd, 627; *Yate* v. *Willan,* 2 East, 128.

19. Payment of money into court on a declaration *for goods sold,* does not, however, admit the plaintiff's interest in the goods beyond the sum paid in. *Blackburn* v. *Scholes and another,* 2 Campb. 341. Ellenborough, C. J. 1810.

And see *Godsall* v. *Boldero,* 9 East, 72, 9.

20. Although the plaintiff had previously delivered a particular, specifying the parcel of goods in respect of which the action was brought. *Ibid.*

21. So where defendant pleads infancy, payment of money into court is no admission of the plaintiff's right of action,

ultra the sum brought in. *Hitchcock* v. *Tyson*, 2 Esp. 482, n. Buller, J. 1786.

22. The payment of money into court upon a count in a valued policy, in which the loss is averred to be total, is no admission that the loss is total. *Rucker and another* v. *Palsgrave* 1 Campb. 557. Mansfield, C. J. 1808.

And the court of C. P. refused a rule to set aside nonsuit; 1 Taunt. 419.

And see *Waldron* v. *Coombe*, 3 Taunt. 162.

But it admits the *interest*, as averred in the declaration; *Bell* v. *Ansley*, 16 East, 146.

So it admits all *facts* stated in the counts, on which the money is brought in; *Godsall* v. *Boldero*, 9 East, 72, 9.

23. Plaintiff may be nonsuited after payment of money into court. *Ibid.*

Acc. *Elliott* v. *Callow*, 2 Salk. 597; *Cox* v. *Robinson*, Cas. Temp. Hardw. 206; *Kabell* v. *Hudson*, 4 T. R. 10; *Burstall* v. *Horner*, 7 T. R. 372.

24. And the defendant cannot demand a verdict. *Smith* v. *Vale*, 2 Esp. 607. Kenyon, C. J. 1797.

Cont. *Jenkins* v. *Tucker*, 1 H. Bla. 93, dict. per Loughborough, C. J.; *Gutteridge* v. *Smith*, 2 H. Bla. 376, dict. per Heath, J.

25. But *semble*, that where plaintiff takes money out of court, and does not move to set the nonsuit aside, he is precluded from bringing a fresh action. *Rogers* v. *M'Carthy*, 3 Esp. 106. Kenyon, C. J. 1800.

26. Where goods are tortiously taken by the defendant, who brings in money generally upon a declaration containing a count for goods sold, it will be presumed that the parties agreed to convert the transaction into a contract of sale. *Bennet* v. *Francis*, 4 Esp. 28. Chambre, J. 1801.

And the court of C. P. discharged a rule for setting aside a verdict for the plaintiff. *Ibid.* and 2 Bos. & Pul. 31.

27. Where money is taken out of court, and the costs are taxed and paid, the plaintiff is not concluded from shewing in a collateral action, that the money was accepted merely to put an end to litigation. *Hildyard* v. *Blowers*, 5 Esp. 69. Ellenborough, C. J. 1803.

Acc. *Nichols* v. *Philips*, 3 Anst. 636.

28. Nor will taking out of court a less sum than the sum sworn to, subject the plaintiff to an action for a malicious arrest. *Jackson* v. *Burleigh*, 3 Esp. 34. Kenyon, C. J. 1799.

29. In an action of covenant, if money be paid into court upon one of the breaches assigned, the execution of the deed is admitted. *Randall* v. *Lynch*, 2 Campb. 357. Ellenborough, C. J. 1810.

30. And if the defendant bring in money *generally* upon a declaration containing a count on a bill of exchange, he cannot take advantage of an improper stamp. *Israel* v. *Benjamin*, 3 Campb. 40. Ellenborough, C. J. and K. B. M. 1811.

Acc. *Gutteridge* v. *Smith*, 2 H. Bla. 374.

31. Payment of money into a superior court is a conclusive admission of the plaintiff's right to sue in such court. *Miller* v. *Williams*, 5 Esp. 19. Ellenborough, C. J. 1803.

32. And where the plaintiff declares in one count for work and labour *as a surgeon*, it is such an admission of the plaintiff's right to sue in that capacity as precludes the defendant from giving evidence that the plaintiff is, or assumes to be, a physician. *Lipscombe* v. *Holmes*, 2 Campb. 441. Ellenborough, C. J. 1810.

33. Proof of the rule to pay money into court will entitle the plaintiff to a verdict, unless the costs have been paid. *Hasburgh* v. *Orme*, 1 Campb. 558, n. 1 Burt. 171, 2. Ellenborough, C. J. 1808.

34. If, after action brought, the debt be paid without a rule of court, the plaintiff must have a verdict. *Atkinson* v. *Thornton*, 1 Campb. 559, n. Ellenborough, C. J. 1808; *Holland* v. *Jourdine*, Holt, 6. Gibbs, C. J. 1815.

S. P. *Toms* v. *Powell*, 7 East, 536; S. C. 3 Smith, 554.

35. Although a receipt be given for debt and costs. *Holland* v. *Jourdine*, Holt, 6. Gibbs, C. J. 1815.

36. Payment of money into court can be proved only by producing the rule. *Israel* v. *Benjamin*, *ubi supra*.

37. Or an office copy. *Still* v. *Halford*, 4 Campb. 17. Ellenborough, C. J. 1814.

38. Where one party clandestinely draws and accepts a bill in the name of the firm, partly for a demand which the payee has against the partnership, and partly for his own debt, the payee, in an action against all the partners, can only recover against the former part of the consideration, though money be paid into court on the counts on the bill. *Barber* v. *Backhouse and others*, Peake, 61. Kenyon, C. J. 1791.

D. Order for production of papers.

39. In an action in C. P. upon a policy of insurance, a judge at chambers will make a general order on the assured to produce, upon affidavit, all papers in his possession relating to the cause. *Goldschmidt* v. *Marryat*, 1 Campb. 562. Mansfield, C. J. 1809.

And see *Clifford* v. *Taylor*, 1 Taunt. 167; *Campbell* v. *French*, 1 Anst. 50; *Potts* v. *Adair*, *ibid.* 259; *Gabbitt* v. *Cavendish*, 2 Anst. 547.

E. Notice.

(And see Trover, B.)

E. (a) *How served.*

40. Notice to produce papers served at the attorney's office on the evening before the trial, after the attorney has left the office, is too late. *Sims* v. *Kitchen*, 5 Esp. 46. Ellenborough, C. J. 1808.

E. (b) *Notice to produce papers, &c. where necessary.*

41. Where a number of placards are printed, and a party adopts and uses some of them, all the rest are duplicate originals, and one of them may be read against such party, without notice to produce. *R.* v. *Watson*, 2 Stark, 190. K. B. 1818.

42. The non-production of books, upon notice merely, entitles the opposite party to give secondary evidence; it does not authorise the jury to speculate upon the probable contents. *Cooper, et alt.* v. *Gibbons*, 3 Campb. 364. Gibbs, J. 1813.

43. Proof that upon a bill being dishonoured duplicate notices of dishonour were written, and that a letter was delivered to the defendant of a bill, together with the proof of notice to produce the letter so delivered, as containing notice of dishonour, is evidence (in default of production) that the defendant had notice. *Roberts* v. *Bradshaw*, 1 Stark. 28. Ellenborough, C. J. 1815.

44. An instrument will be presumed to be stamped, against a party refusing to produce it. *Crisp* v. *Anderson*, 1 Stark. 35. Ellenborough, C. J. 1815.

45. But the contrary may be proved. *Ibid.*

46. D. as surety for A. binds himself to pay B. the balance of account due from A. within six months after notice, parol evidence of such notice cannot be given, without notice to produce it, since it operates, not merely as a notice, but as a statement of accounts. *Grove and another* v. *Ware*, 2 Stark. 174. Ellenborough, C. J. 1817.

E. (c) *Effect of.*

47. After a notice to defendant to produce cheques, the plaintiff calls for one of them. All are put into his hand, and after looking them over, he selects one. Held, that as the plaintiff did not take the first that offered itself, defendant is entitled to have the whole read. *Speer* v. *Watts.* Holroyd, J. Taunton Spring Assizes, 1818.

E. (d) *Notice to dispute consideration.*

48. *Semble*, That between immediate parties the consideration may be impeached without notice. *Green* v. *Deakin and others*, 2 Stark. 347. Ellenborough, C. J. 1818.

49. In an action by indorsee against acceptor, the defendant cannot, by merely giving notice that such proof will be required, compel the plaintiff to shew what consideration he has given; before such proof can be called for, some suspicion must be thrown upon the plaintiff's title. *Reynolds* v. *Chettle*, 2 Campb. 596. Ellenborough, C. J. 1811.

50. S. P. *Clark* v. *Elliott*, Selw. N. P. 304. London sittings, B. R. after M. T. 1811.

51. It was afterwards held that where

such notice has been given, the plaintiff must make the proof of consideration part of his case, and not reserve it for the reply. *Delancy* v. *Mitchell*, 1 Stark. 439. Ellenborough, 1815; and *Humbert* v. *Ruding*, Chitty on Bills, 512. Ellenborough, C. J. 1817.

52. But the present Chief Justice has, at Nisi Prius, declared the former to be the correct course. Chitty, 512, note (3).

53. *Semble*, that the notice of action against a magistrate must be indorsed by an attorney who has taken out his certificate. *Sabin* v. *De Burgh and others*, 2 Campb. 196. Ellenborough, C. J. 1809.

54. But proof that the attorney had ordered his clerk to take out his certificate, and had given him money for that purpose, is sufficient evidence of qualification. *Ibid.*

55. After notice to the defendant, a ship-owner, to produce letters, &c., the plaintiff may give secondary evidence of a document relating to the vessel, in the custody of the captain, on account of the privity between captain and owner. He is not bound to subpœna the former. *Baldney and another* v. *Ritchie*, 1 Stark. 338.

56. In an action by A. as assignee of B. against M. a notice, entitled A. assignee of B. and C. against M., is insufficient, though the commission was against B. and C. jointly. *Harvey and others, assignees of Harvey*, v. *Morgan*, 2 Stark. 17. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

57. The defendant cannot, *in strictness*, cross-examine the plaintiff's witnesses as to the contents* of papers, though the plaintiff refuses to produce them in that stage of the cause. *Sideways* v. *Dyson and another*, 2 Stark. 49. Ellenborough, C. J. 1817.

F. Consent rule.

58. In ejectment for an undivided moiety, the plaintiff is bound to give evidence of an *actual ouster*, or to prove the consent rule *confessing ouster*. *Doe* d. *White* v. *Cuff*, 1 Campb. 173. Ellenborough, C. J. 1808.

And see *Reading's case*, 1 Salk. 392; *Doe* d. *Fisher* v. *Prosser*, Cowp. 218; *Peaceable*, d. *Hornblower*, v. *Read and others*, 1 East, 568; *Oates* d. *Wigfall* v. *Brydon and others*, 3 Burr. 1897; Adam's Ejectm. 2d edition, 318; *Doe* d. *Hellings* v. *Bird*, 11 East, 49.

G. Entering the record.

59. It is the rule on all the circuits that where business is not done on the commision day, causes must be entered before the court sits, on the day when business is begun. *Skeye* v. *Voyce*, 3 Campb. 365. Bayley, J. Worcester, 1813.

60. But under special circumstances the court will listen to an application for leave to enter a cause afterwards. *Ibid.*

H. Putting off trial.

(And see ante, Costs, A. (a) 1, 2.)

61. An affidavit to put off a trial on account of the absence of a material witness, may be made by the *attorney* in the cause. *Duberley* v. *Gunning*, Peake, 97. Kenyon, C. J. 1797.

S. C. not S. P. 4 T. R. 651.

And see *Sullivan* v. *Magill*, 1 H. Bla. 637.

62. And the motion may be made on the day on which the cause stands for trial. *Ibid.*

63. Or called on. *Hart* v. *Whitelocke*, Barnes, 452.

64. In answer to an application to put off a trial, an affidavit may be read which was made before the affidavit on which the motion was made. *Brooke, esquire*, v. *Wellington, esquire*, Graham, B. Bristol, 1819.

65. And it appears to be no objection to such affidavit that it was sworn before a commissioner in the country, and transmitted to town (but not used) for another purpose. *Ibid.*

66. An application may be made at nisi prius to postpone the trial of a a chancery issue. *Buxton* v. *Lawton*, 4 Campb. 163. Gibbs, C. J. 1815.

67. A judge at nisi prius will not either accelerate or retard a trial, in expectation of the interference of a court of

equity. *Goldschmidt* v. *Marryatt*, 1 Campb. 559. Mansfield, C. J. 1809.

68. A judge at nisi prius will, on the application of the plaintiff, make an order for putting off the trial from one day in the sittings to another, on account of the indisposition of a witness. *Ansley* v. *Birch*, 3 Campb. 333. Ellenborough, C. J. 1813.

69. But the defendant is entitled to costs. *Ibid.*

70. And the plaintiff will not be allowed to put off the trial beyond the sittings. He must withdraw the record. *Ibid.*

And see Westm. 2. cap. 46; 2 Inst. 256.

71. A trial will not be put off, upon a motion at nisi prius, to enable the plaintiff to substitute an excuse for profert. *Paine* v. *Bustin*, 1 Stark. 74. Ellenborough, C. J. 1815.

I. WITHDRAWING THE RECORD.

72. Counsel *retained* by the plaintiff, who have not received their *briefs*, have no power to withdraw the record. *Abitbol* v. *Beneditto*, 2 Campb. 487. Lawrence, J. 1810.

And the chief justice ordered the nonsuit to stand. *Ibid.* Mansfield, C. J. 1810.

S. C. 3 Taunt. 225.

K. NONSUIT.

73. A judge at nisi prius will direct a nonsuit, on the ground of the non-performance of a condition precedent, although the objection is on the record. *Sadler* v. *Robins*, 1 Campb. 256. Ellenborough, C. J. 1808.

74. Where assignees are nonsuited, they are not entitled to the costs occasioned by a notice to dispute the trading. Act of bankruptcy, and petitioning creditors' debt, Appendix.

75. One indictment against A. and another against A. and B. are entered for trial as common jury causes by the defendants, special juries having been struck in both by the prosecutor: the prosecutor cannot, if he withdraw the first record with a view to reverse the order of trial, prevent the defendant from being acquitted. *Rex* v. *Houlditch and another*, 1 Stark. 63. Ellenborough, C. J. 1815.

L. JUDGMENT AS IN CASE OF A NONSUIT.

76. The defendant is not entitled to judgment as in case of a nonsuit, where the judge at nisi prius, after the opening of the pleadings, stops the cause as not fit to be tried. *Henkin* v. *Gerss*, 2 Campb. 408. K. B. E. 1810.

S. C. 12 East, 248.

And see Anon, Bunb. 17; Sav. 57, pl. 122.

M. TRIAL.

(And see ante, PLEADING, A. (c).)

M. (a) *In what county.*

77. Felonies in Wales, created since 26 Hen. VIII. cap. 6. are triable in the next English county. *Rex* v. *Window*, 3 Campb. 78. Le Blanc, J. Hereford, 1811.

M. (b) *Attendance and demeanour of parties.*

78. At the trial of an information against a peer for a misdemeanour, the defendant is not entitled to sit covered, or to have a place assigned to him. *The King* v. *Lord Abingdon*, 1 Esp. 226, and Peake, 236. Kenyon, C. J. 1794.

79. A prisoner, who is a party to a suit, is not entitled to be brought up to hear the trial. *Thelluson* v. *Coppinger*, 3 Esp. 283. Kenyon, C. J. 1801.

And see Anon. 2 Salk. 544; *Rex* v. *Feilding*, Comb. 29; *Meekings* v. *Smith*, 1 H. Bl. 636; *Cole* v. *Hawkins*, Andr. 275.

80. But a defendant is protected from arrest in coming to attend the trial. *Solomon* v. *Underhill*, 1 Campb. 229. Ellenborough, C. J. 1808.

S. P. *Lightfoot* v. *Cameron*, 2 Bla. 1113. And see *Childerston* v. *Barrett*, 11 East, 439; Tidd, 196.

81. And if he be arrested, *eundo*, the judge will grant a *habeas corpus* to discharge him, and will put off the trial. *Ibid.*

And see Tidd, 784.

82. But this must be upon payment of costs; unless the plaintiff appears to have colluded with the creditor. *Ibid.*

83. The plaintiff's attorney is not bound to attend the trial of the cause. *Dax* v. *Ward*, 1 Stark. 409. Ellenborough, C. J. 1816.

S. P. H. 21, E. 3, fo. 46, pl. 64.

And see T. 11, E. 4, fo. 2, pl. 4; Manning's Exchequer Practice, 585, 586.

84. He is therefore not responsible for a failure occasioned by his own absence, concurring with that of a witness whose attendance he had reason to expect. *Ibid.*

M. (c) *Particular defences, where excluded.*

85. A defendant, under terms not to give coverture in evidence, cannot shew that the goods were delivered on the credit of the husband. *Snell* v. *Rice*, Peake, 235, and 1 Esp. 221. Kenyon, C. J. 1794.

And see Tidd, 564.

86. *Semble*, that an award made after issue joined, cannot be given in evidence under the original pleadings, but must be pleaded *puis darrein continuance*. *Storey* v. *Bloxam*, 2 Esp. 504. Kenyon, C. J. 1796.

See *Thomlinson* v. *Arriskin*, 1 Com. Rep. 330; *Hawkins* v. *Colclough*, 1 Burr. 275.

M. (d) *Jury.*

And see post. STATUTE, pl. 1; WITNESS, C. (d); ante, K. 75.)

87. Where the defendant has served a rule for a special jury, but none has been struck, the plaintiff may try the cause in its regular order as a common jury cause. *Farmer and another* v. *Richards and another*, 2 Stark. 369. Ellenborough, C. J. 1818.

88. And upon a motion for a new trial the court said "that it was incumbent upon a party who meant to have his cause tried by a special jury, to pursue the object in all its steps, and to do every thing in his power in order to enable the other party to apply to the judge at nisi prius to try the cause upon a statement that it would occupy no more time than a common cause." *Ibid.*

89. In criminal cases a judge cannot certify for the costs of a special jury. *The King, on the prosecution of Sermon,* v. *Lord Abingdon*, 1 Esp. 226. Kenyon, C. J. 1794.

90. Upon application made to appoint particular days for the trial of special jury causes, where there was no defence, Lord Ellenborough said, "I wish this to be understood to be the rule in future. If the jury has been reduced, and a case be made out, shewing that there is no defence, I will appoint a particular day, that the plaintiff may have the benefit of the trial; but if the jury has not been reduced, the trial must come on as a common jury cause." 1 Stark. 31. Guildhall, 1815.

91. A judge cannot certify for the costs of a special jury the day after the trial. *Waggett* v. *Shaw*, 3 Campb. 316. Ellenborough, C. J. 1812.

92. If, during the course of a trial for a felony, one of the jurymen becomes incapable of going through his duty, the remaining eleven are to be discharged, and a new jury is to be charged with the prisoner in the usual form. *Rex* v. *Edwards*, 3 Campb. 207. Wood, B. Monmouth, 1812, and Cam. Scacc. E. 1812, where two anonymous cases to the same effect were cited.

S. P. *Rex* v. *Ann Scalbert*, Leach, Cro. Cases, 706.

And see Appendix.

M. (e) *Verdict.*

93. One of several defendants in an action *ex delicto*, against whom the plaintiff has laid no evidence before the jury, is not entitled to a verdict of acquittal upon the closing of the plaintiff's case. *Huxley* v. *Berg and another*, 1 Stark. 98. Ellenborough, C. J. 1815.

94. But the plaintiff cannot implicate him by evidence adduced to rebut the case set up by the other defendants. *Ibid.*

95. Upon an indictment against A., B., C., and D., for a conspiracy, it is competent to the prosecutor to state that he has no evidence to offer against

A. or B. and to call upon the jury for an immediate verdict of acquittal as to them. *Rex* v. *Meyer and others*, Abbott, C. J. Guildhall, 20th April, 1819, after hearing Gurney for the prosecution, and Scarlett for defendants C. and D.

96. The assent of all the jury to the verdict pronounced by the foreman, in their presence and hearing, is to be conclusively inferred. *Rex* v. *Wooller*, 2 Stark. 111. K. B. T. T. 1817.

97. And no affidavit can in any case be admitted to the contrary. *Ibid.*

98. But where the whole of the jury were not present, when a verdict of guilty was delivered, and it was uncertain whether they all heard the verdict pronounced by the foreman, the court granted a new trial. *Ibid.*

K (f) *Counsel.*

(And see ante, M. Barrister; post, Witness, B. (c).)

99. Held, that where defendants, in the same interest, appear by separate attorneys and counsel, only one counsel can address the jury, and each witness is to be examined by one counsel on the part of all the defendants, as if the defence were joint. *Chippendale* v. *Masson and others*, 4 Campb. 174. Gibbs, C. J. 1815.

100. Where, upon an information for a misdemeanour, the defendant calls no witnesses, the counsel for the prosecution, except in the case of the attorney general (prosecuting for the crown) is not entitled to a reply. *The King, on the prosecution of Sermon*, v. *Lord Abingdon*, 1 Esp. 226, and Peake, 236. Kenyon, C. J. 1794.

101. In criminal prosecutions *instituted by the crown*, the counsel for the crown have in all cases the general reply. *Rex* v. *Mortimore and Roach*. Abbott, J. Devon Spring Assizes, 1818.

102. S. P. contra, *Rex* v. *Smith*, Peake, 236, n. Kenyon, C. J. 1797.

103. But if the plaintiff's counsel in opening claim only the balance of an account stated, which he fails to prove, he may, *before he closes his case*, charge the defendant with money received to the plaintiff's use. *Murray and another* v. *Butler*, 3 Esp. 105. Kenyon, C. J. 1800.

See *Penson* v. *Lee*, 2 Bos. and Pul. 331, 2, 3; *Warden* v. *Bailey*, 4 Taunt. 81, 2.

104. Counsel may read, as part of an address to the jury, an extract from a book in which is advanced a speculative opinion bearing on the point in question. *Plunkett* v. *Cobbett*, 5 Esp. 136. Ellenborough, C. J. 1804.

105. If, however, a book be produced for the purpose of shewing, that, previously to the publication of a libel by the defendant, the obnoxious matter was in circulation, it must be formally proved. *Ibid.*

And see Appendix.

106. Where there are several counsel for one party, and the junior has begun to interrogate a witness, the leader may interpose, and take the examination into his own hands. *Doe* v. *Roe*, 2 Campb. 280. Ellenborough, C. J. 1809.

107. But a witness cannot regularly be examined, or cross-examined, by the counsel on the same side in succession. *Ibid.*

108. Where, on an information for a misdemeanour, the party conducts his own defence, counsel will be heard on any point of law which arises. *Rex* v. *White*, 2 Campb. 98. Ellenborough, C. J. 1811.

109. S. P. *Rex* v. *H. Swann, esq.* Best, J. Bodmin, 1819.

110. But he cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury. *R.* v. *White, ubi supra.*

111. Where the defendant pleads *not guilty* to the *vi et armis*, and justifies as to the residue of the trespasses, he is entitled to begin, and to have the general reply. *Hodges* v. *Holder*, 3 Campb. 366. Bayley, J. Worcester, 1813.

112. So in ejectment where the defendant admits the validity of a will, under which the lessor of the plaintiff claims, but would entitle himself under a codicil, he has a right to begin and reply. *Doe d. Sir Richard Corbett, Bart.* v. *Corbett, clerk*, 3 Campb. 368. Bayley, J. Worcester, 1813.

113. Where by the pleadings, or by

notice, the nature of the defence is manifest, the plaintiff is bound to open the whole case in chief. *Rees* v. *Smith and others*, 2 Stark. 31. Ellenborough, C. J. 1817.

114. And where the defendant alleges a fraudulent removal to avoid a distress, he will not be permitted to produce evidence of the *bona fides* of the removal in his reply, after having opened merely a prima case of trespass. *Ibid.*

N. NEW TRIAL.

(And see ante, ACTION, D. (c); MISDEMEANOR.)

115. A new trial will not be granted after verdict for defendant in a penal action, except in the case of a misdirection. *Brooke, qui tam*, v. *Middleton*, 1 Campb. 450. K. B. M. T. 1808.

S. C. 10 East, 268.

N. As to the rule, see *Fencreau* v. *Bennett*, 3 Wills. 17; *Smith* v. *Frampton*, 1 Lord Raym. 62; *Seymour* v. *Day*, 2 Stra. 889; *Mattison* v. *Allanson*, *ibid.* 1238; *Rex* v. *Reynell*, incorrectly reported 6 East, 315; acc. *Rex* v. ——, 2 Keb. 226, cont. And as to the exception, see *Wilson* v. *Rartall*, 4 T. R. 758; *Colcraft* v. *Gibbs*, 5 T. R. 19; *Rex* v. *Reynell*, 2 Smith, 406, where it is stated that the motion was made on the ground of misdirection, as was the fact; vide MSS.

PREROGATIVE.

1. The right to gauge articles imported into the kingdom, whether for sale or otherwise, is inherent in the crown. *Mayor, &c. of London* v. *Long*, 1 Campb. 26. Ellenborough, C. J. 1807.

2. Process cannot be executed in a royal palace kept in a condition to receive the king, though he may never have in fact resided there, and though private families, unconnected with the household, occupy apartments therein, by permission from the lord chamberlain. *Winter* v. *Miles and another*, 1 Campb. 475. Ellenborough, C. J. 1808.

And the court discharged a rule for a new trial. *Ibid.* and 10 East, 578.

And see *Elderton's case*, 3 Salk. 92, 284.

PROCESS.

(And see ante, ARREST, pl. 14; FOREIGN JUDGMENT, pl. 8.)

A. SERVICE OF PROCESS.

(And see ante, PREROGATIVE, pl. 2.)

1. Bill of Middlesex cannot be served in London. *Slack* v. *Brander and Tebbs, sheriffs of London, and Coulson*, 1 Esp. 42. Kenyon, C. J. 1793.

S. P. *Devenege* v. *Dalby*, Dougl. 369, 84; *Borman* v. *Bellamy*, 1 T. R. 187. S. P. *e converso*, *Chace* v. *Joyce*, 4 M. and S. 412. And see *Willis* v. *Pendrill*, 2 N. R. 167; *Drew* v. *Marriott*, 1 Wils. 77; Mann. Exch. Pract. 413.

PROCTOR.

1. A proctor may recover for business done by A. his clerk, in the name of A., if no prejudice have arisen to the defendant from supposing A. to be the principal. *Grojan* v. *Wade*, 2 Stark. 443. Abbott, C. J. 1819.

2. An agreement between a proctor and his clerk that the latter shall receive a salary equal to half the profits during the *last* three years, is not an evasion of the statute. (53 Geo. III. cap. 127. sect. 9.) *Ibid.*

RELEASE.

(And see

A. TO ENLARGE THE ESTATE.

1. A bargain and sale for a year to A. and his wife, will support a release to A. and a third person. *Doe* d. *Saunders* v. *Cooper*, Holt, 461. Wood, B. York, 1816.

REPLEVIN.

(And see AGREEMENT, pl. 44.)

A. WHERE THE MOST EFFECTUAL REMEDY.

B. PLEADINGS.

C. EVIDENCE.

A. WHERE THE MOST EFFECTUAL REMEDY.

1. For the purpose of recovering a specific chattel, the proper course is to sue out replevin, not to bring trover, in which damages only are recovered. Per Lord Ellenborough, in *Dore* v. *Wilkinson*, 2 Stark. 288.

N. And replevin appears to be preferable to detinue, in which, though the judgment is in the alternative for the chattel, or the value, the restoration of the chattel can only be enforced by writ of *distringas ad liberandum*, which may be ineffectual. See Appendix to Manning's Exch. Practice, 297.

Quære, Whether the defendant may not plead to the writ. See M. 5, H. 7, fo. 3, pl. 6.

2. A. was bringing an action on the case, or of assumpsit insteadof replevin. Vide ante, ASSUMPSIT.

3. Where to an avowry for rent due upon a quarterly holding, the plaintiff does not deny the tenure, but pleads *rien in arrere*, he cannot shew that the holding is half yearly, and that therefore no rent had accrued, though one of the *quarters* had elapsed. *Hill* v. *Wright*, 2 Esp. 669. Buller, J. 1798.

B. PLEADINGS.

4. After removal into superior court, it is no plea to say that defendant avowed below for a different cause. T. 20, E. 3; Fitz. Avowry, 130; and see 3 Co. 26, b; 3 T. R. 645; 1 East, 142; 7 T. R. 654; but see 1 Leon. 50; H. 5. E. 2. Fitz. Estoppel, 258; T. 10. E. 2. Fitz. Avowry, 213.

5. An issue that defendant and all other occupiers of black acre, have used to repair fences against *locus in quo*, cannot be supported where there has been unity of possession. *Ribbeck* v. *Pothecary and* Abbott, J. Salisbury, Spring Assizes, 1818.

C. EVIDENCE.

6. Under the plea of *non tenent*, the plaintiff cannot shew that his landlord, by whom he was let into possession, acquired the property by a fraudulent and void assignment. *Parry* v. *House*, Holt, 489. Dallas, J. 1815.

7. An issue in replevin between A. and B. as bailiff to C. upon the tenancy, upon cognizance of B. found against A. is conclusive evidence of the tenancy. *Hancock* v. *Welch*, 1 Stark. 347. Ellenborough, C. J. 1816.

7. And it was said that it would have been so if the former issue had been between A. and a stranger. *Ibid.*

Sed vide Mann. Exch. Pract.

RETRAXIT.

1. Where, in an action on an annuity bond, a defective memorial is pleaded, and the plaintiff enters a *nolle prosequi*, he may recover the consideration as money had and received. *Este* v. *Broomhead*, 3 Esp. 261. Kenyon, C. J. 1801.

N. That an entry of a *nolle prosequi* is, under such circumstances, a retraxit. See Manning's Exch. Pract. 366.

RIOT.

1. The spectators in a public theatre have a right to express the feelings excited at the moment by the performance, and to applaud or hiss the piece or the actor. *Clifford* v. *Brandon*, 2 Campb. 358. Mansfield, C. J. 1809.

2. But if persons coming to a theatre with a predetermined purpose of interrupting the performance, make a great noise and disturbance, so as to render the actors inaudible, they are guilty of a riot; though no personal violence be attempted, and no injury be done to the theatre. *Ibid.*

RIOT ACT.

(And see post, STATUTES, B. (b).)

1. The mob, after tearing down window frames, &c. retire upon the approach of the military: this is a beginning to demolish. *Lord King* v. *Chambers and another*, 1 Stark. 195. Ellenborough, C. J. 1816.

2. But if the mob withdraw spontaneously, without proceeding further in the work of demolition, it is a question of fact whether what was done was done with intention to demolish. *Ibid.*

3. A house is attacked by a mob, with intent to liberate their leader, or pull down the house, in case he be not restored to them, and proceed to acts of violence. This is a sufficient beginning to demolish. *Beckwith* v. *Wood and another*, 2 Stark. 262. Ellenborough, C. J. 1817.

4. Damages may be recovered in respect of guns used and damaged in the work of demolition; but not for guns stolen by the mob. *Ibid.* 268, n. K. B. E. T. 1818.

5. It does not affect the case to shew that the plaintiff has convicted a party for the felonious taking. *Ibid.*

6. A house partly occupied by the plaintiff as a shop, and partly let out by him to lodgers, is the dwelling house of the plaintiff within the meaning of the Riot Act. (1 Geo. I. s. 1. cap. 5.) *Rea* v. *Wood and another*, 2 Stark. 269. Ellenborough, C. J. 1817.

And the court refused a rule on this ground for a new trial. *Ibid.* 271.

RIVERS.

1. In a public navigable river, all vessels may moor and stay as long as the owners choose, provided they do not abuse their right by remaining there for the purpose of interrupting the enjoyment of a fishery or other private easement. Anonymous, 1 Campb. 517, n. Wood, B. Durham, 1808.

2. Found, by the verdict of a special jury, that there is a custom to moor barges at low water, for one tide, at the piles in front of wharfs in the Thames; but that where there are no piles, the custom does not allow barges to moor at the wharf, except in cases of distress. *Wyatt* v. *Thompson*, 1 Esp. 252. Kenyon, C. J. 1794.

3. A party cannot be indicted for not removing a vessel sunk by accident in a navigable river. *The King* v. *Watts*, 2 Esp. 675. Kenyon, C. J. 1798.

But see ante, ACTION ON THE CASE, pl. 69.

SCHOOLMASTER.

(And see ante, BANKRUPT, pl. 21.)

1. Assumpsit against schoolmaster for *delivering* fireworks to plaintiff's son and suffering him to retain them, with special damage contrary to the duty and undertaking of defendant. Held not maintainable without proof of a *delivery by defendant* as alleged. *King* v. *Ford*, 1 Stark. 421. Ellenborough, 1816.

2. Where a schoolmaster seeks to recover beyond the actual period of schooling, on the ground of removal without notice, according to the terms of a prospectus delivered to the defendant, the identical copy of the prospectus delivered to the defendant must be produced, stamped. *Williams* v. *Stoughton*, 2 Stark. 292. Ellenborough, C. J. 1817.

3. But in another case it was considered that the prospectus was a bare proposal, and that it was competent to the plaintiff to produce it as the basis of the subsequent parol agreement without a stamp. *Edgar* v. *Blick*, 1 Stark. 464. Ellenborough, C. J. 1816.

SCIRE FACIAS.

1. In *scire facias* against bail, the plaintiff may be nonsuited. *O'Mealey* v. *Wilson and another*, 1 Campb. 484. Ellenborough, C. J. 1808.

And see Y. B. 17 E. 3, 1.

SET OFF.

(And see Mann. Exch. Pra. 263.)

A. By whom.

(a) *In cases of partnership.*

(b) *In respect of the certainty of the debt or duty sued for.*

B. Against whom.

(a) *In cases of marriage.*

(b) *In cases of partnership.*

(c) *In cases of agency.*

(d) *In respect of special contract.*

C. Subject matter of set off.

D. Practice relative to set off.

(a) *Form of set off.*

(b) *How pleaded with other pleas.*

(c) *Particulars of set off.*

(d) *Replication.*

(e) *Effect of set off upon collateral proceedings.*

A. By whom.

A. (a) *In cases of partnership.*

1. A person sued in his own right, may set off a debt due to him as surviving partner. *Slipper, assignee of Lane,* v. *Stidstone,* 1 Esp. 47. Kenyon, C. J. 1793.

2. And the plaintiff, at the recommendation of the court of K. B. abandoned a rule nisi to set aside nonsuit. *Ibid,* and 5 T. R. 493.

. S. P. *e converso, French* v. *Anderson,* 6 T. R. 582.

And see Y.B.M. 33, H. 6, fo. 43, pl. 23.

A. (b) *In respect of the certainty of the debt or duty sued for.*

3. Upon the assignment of a leasehold messuage from L. to A., L. covenants that he will pay "all the rent, taxes, rates, charges, and other outgoings whatsoever, which shall become payable in respect of the said premises, up to and until the 29th day of Sept. then instant, *and shall and will well and sufficiently save harmless and indemnify the said A. his, &c. from and against the payment thereof respectively.* A. declares that although divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 100l. of lawful, &c. became and were due and owing for rates, taxes, and charges, and other outgoings, payable in respect of the said premises before and up to and until the said 29th day of Sept. in the year 1817, aforesaid, to wit, at, &c. yet the said L. did not nor would pay or cause to be paid the said sum of money so payable for taxes, &c. in respect of the said premises as aforesaid, *and did not nor would save harmless and indemnify the said A. from and against the payment thereof, but wholly neglected so to do, to wit, at, &c.* And by reason thereof the said A. after the making of the said indenture, to wit, on, &c. at, &c. was forced and obliged to pay, and did then and there necessarily pay the said moneys which so became and were in arrear, for such taxes, &c. contrary, &c. To this declaration the defendant L. pleads a set off for fixtures and furniture taken by A. at an appraisement. Upon demurrer to the plea, it was urged, by Manning, for the defendant, that the plaintiff A. having restricted his allegation of damnification to the being compelled to pay a liquidated sum, the declaration was in effect for money paid to L.'s use. But the court, without hearing Chitty for the plaintiff, held, that inasmuch as he might have been damnified beyond the amount of the taxes, a set off could not be pleaded. An objection was raised to the nature of the cross demand, as forming a proper subject of set off, but this point was not discussed, the court having proceeded immediately to the other objection. *Auber* v. *Lewis,* E. T. 1818, K. B.

The cases cited for the defendant, on the first point, were Dyer, 2 b; 3 H. 6. *fol. ult.;* Bro. tit. Abr. 26; *Saunders* v. *Marke,* 3 Levinz, 429; Cro. Eliz. 561. As to the second point, see *Woodford* v. *Deacon.* Cro. Jac. 206; *Buckenham* v. *Costendine, ibid.* 213; *Rooke* v. *Rooke, ibid.* 245; *Fowk* v. *Pinsach,* 2 Levinz, 153; *Dixon* v. *Walloughs,* 2 Salk. 446; *Hibbert* v. *Curthope,* Carthew, 277, Skinner, 409, S. C.; *Gardiner* v. *Bellingham,* Hobart, 5.

B. Against Whom.

B. (a) *In cases of marriage.*

4. A debt owing from the wife *dum sola*, cannot be set off in an action brought by the husband alone. *Wood* v. *Akers*, 2 Esp. 594. Eyre, C. J. 1797.

5. But if he make himself individually liable by ordering the debt to be paid after marriage, the set off will be allowed. *Ibid.*

B. (b) *In cases of partnership.*

6. A. and B. being indebted to B. who carried on a separate trade, remit to him a note given to them by C. In an action by B. as indorsee, against C. the latter may set off any demand which he has against the partnership. *Puller and others, assignees of Forbes and Gregory, bankrupts* v. *Roe and others*, Peake, 197. Kenyon, C. J. 1793.

And see Hanson, *ex parte*, 12 Ves. 346; Stephens, *ex parte*, 11 Ves. 27; Twogood, expatte, *ibid.* 517, 9.

7. In an action brought by an ostensible and dormant partner, the defendant may set off a debt owing to him from the ostensible partner only. *Stacy, Ross, et alt.* v. *Decy*, 2 Esp. 469, n. Kenyon, C. J. 1789.

S. C. 7 T. R. 361, n.

B. (c) *In cases of agency.*

8. If a factor sell goods in his own name, the vendee in an action brought by the real vendor, may set off a debt owing to him from the factor. *George* v. *Claggett and Pratt*, 2 Esp. 557. Kenyon, C. J. 1797.

And the court of K. B. discharged a rule for a new trial. *Ibid*, and 7 T. R. 359.

S. P. *Rabone* v. *Williams*. 7 T. R. 360.

And see *Scott* v. *Surman*, Willes, 400.

9. Where the factor has a lien upon goods, the vendee cannot set off a debt owing to him from the principal, though such principal be named at the sale. *Atkyns and Batten* v. *Amber*, 2 Esp. 493. Eyre, C. J. 1796.

And see *Fair* v. *M'Iver*, 16 East, 130; *Wake* v. *Tinkler*, *ibid.* 36.

10. In an action for premiums by executors of underwriter against insurance broker, he cannot set off or deduct returns of premium which accrued after testator's death. *Houston and others, executors of Nicholson* v. *Robertson*, 4 Campb. 342. Gibbs, C. J. 1815.

11. Auctioneer may sue the vendee in his own name, though the name of the vendor be declared at the time of sale. *Atkyns and Batten* v. *Amber*, 2 Esp. 493. Eyre, C. J. 1796.

And see *Coppin* v. *Craig*, 7 Taunt, 243; *Coppin* v. *Walker*, *ibid.* 237.

12. Where brokers without a *del credere* commission, effect policies in their own names "as agents," they cannot, in an action for premiums by the assignees of a bankrupt underwriter, set off a total loss accruing, but not adjusted before the bankruptcy, although the policies have always remained in their hands, and they have actually paid the amount of the loss to the assured. *Bakers and others, assignees of Gregory*, v. *Langhorn and others*, 4 Campb. 396. Gibbs, C. J. 1815.

13. In an action by an underwriter against an insurance broker for the amount of premiums, the latter may set off an average loss adjusted by the plaintiff, the payment of which the broker has guaranteed to the assured under a *del credere* commission. *Wienholt* v. *Roberts*, 2 Campb. 586. Ellenborough, C. J. 1811.

And see *Grove* v. *Dubois*, 1 T. R. 112; *Whitaker* v. *Rush*, Ambl. 407; ante, Pleading, pl. 42.

B. (d) *In respect of special contract.*

14. So where goods are sold for bill at two months, which the vendee refuses to accept, there can be no set off, if the action be brought before the expiration of the two months. *Hutchinson* v. *Reid*, 3 Campb. 329. Ellenborough, C. J. 1813.

And see Vendor and purchaser, C. post.

15. Where A. delivered goods to B. for sale, upon an agreement that B. should retain a certain part of the proceeds against a debt to him from A. and

should pay over the residue to A., it was held, that B. could not set off the remainder of his debt in a special action for a breach of the agreement, in not paying over the residue of the proceeds. *Colson et alt. assignees of Hunter*, v. *Welsh*, 1 Esp. 379. Kenyon, C. J. 1795.

16. Where upon a plea of set off in debt on bond, the plaintiff takes issue upon the sum alleged to be due, according to the consideration of the bond, he is bound to prove a larger sum due. *Bell* v. *Shaw*, Holt, 293. Gibbs, C. J. 1816.

C. Subject matter of set off.

17. A manufacturer who refuses to deliver goods ordered, without payment or security, may set off the amount as goods *bargained* and sold. *Dunmore* v. *Taylor*, Peake 41. Buller, J. 1791.

18. An overpayment of rent under the threat of a distress, cannot be set off as money had and received to the tenant's use. *Knibbs* v. *Hall*, 1 Esp. 84. Kenyon, C. J. 1794.

Recognized in *Lothian* v. *Henderson*, 3 Bos. and Pul. 530.

19. To enable an attorney to set off his fees he must deliver a bill signed. *Bulman* v. *Birkett*, 1 Esp. 449. Kenyon, C. J. 1796.

20. But it is not necessary that a month should intervene between the delivery of the bill and the trial. *Ibid.*

21. Defendant may set off a debt, for the recovery of which he had brought an action against the plaintiff before any debt had accrued from him to the plaintiff. *Knibbs* v. *Hall, one, &c.* Peake, 210. Kenyon, C. J. 1794.

S. C. not S. P. 1 Esp. 84.

22. Where there are reciprocal demands the statute of limitations does not attach, though the parties be not merchants. *Cranch, executrix, &c.* v. *Kirkman and others*, Peake, 121. Kenyon, C. J. 1792.

23. *Secus*, where many years have elapsed between the demands of the respective parties. *Ibid.*

And see these points fully discussed in *Catling* v. *Skoulding*, 6 T. R. 189; 2 Saund. 127. n. 6. See also *Topham* v. *Braddick*, 1 Taunt. 572.

24. Where there are cross demands arising out of one transaction, and the plaintiff keeps alive his claim by continuing down process, the statute of limitations will not be considered to run against the defendant's set off. *Ord, esq.* v. *Ruspini*, 2 Esp. 570. Kenyon, C. J. 1797.

25. Unliquidated damages cannot be set off. *Crawford and others* v. *Stirling*, 4 Esp. 207. Ellenborough, C. J. 1802.

Acc. *Freeman* v. *Hyett*, 1 Bla. 394; *Dowsland* v. *Thompson*, 2 Bla. 910; *Howlett* v. *Strickland*, Cowp. 56; *Waters* v. *Weigall*, 2 Anst. 575; *Weigall* v. *Waters*, 6 T. R. 488; *Gillett* v. *Mawman*, 1 Taunt. 137, 40; ante, Pleading, pl. 41.

26. A custom in trade to set off damage to goods dyed in the general account, is a sufficient defence, without previously ascertaining the amount of damage. *Bamford* v. *Harris*, 1 Stark. 343. Ellenborough, C. J. 1816.

N. But in some cases the amount may be *recouped* from the damages sustained by the other party. Dyer, 2 b; Br. Abr. tit. Abridgment 26; *ibid.* Assize, 140; *ibid.* Damages, 7, 94, 96, 99, 132; *ibid.* Emblements, 11, cites 24 E. 3. 50; ante, Action, E; Agent, A. 15; post, pl. 31.

And see *Sherborne* v. *Siffkin*, 3 Taunt. 525; *Nichols* v. *Philips*, 3 Anst. 636.

27. Where A. guarantees the payment of goods furnished by B. to C.; and B. upon the insolvency of C., admits the amount of the goods, and of his consequent liability, such amount cannot be set off, in an action by A. against B. *Crawford* v. *Stirling, ubi supra.*

28. But if A. and B. settle the amount to which the latter will be *damnified* by the insolvency of C., such amount may be set off. *Ibid.*

29. *Secus*, if a merely nominal sum is carried to account. *Ibid.*

30. In an action by a servant for wages, the master cannot set off the value of goods lost by the negligence of the plaintiff, although he admitted his liability to pay. *Le Loir* v. *Bristow*, 4 Campb. 134. Ellenborough, C. J. 1815.

31. But if it formed part of the original agreement that the servant should

pay out of his wages for all his master's goods lost through his negligence, the value may be deducted from the wages under the *general issue*. *Ibid.*

And see Y. B. M. 33. H. 6. fo. 43, pl. 23.

32. A creditor who borrows money of his debtor upon an express promise to repay the amount, may nevertheless set off his original debt. *Lechmere, esq.* v. *Hawkins, gent.* 2 Esp. 626. Kenyon, C. J. 1798.

S. P. *Taylor* v. *Okey,* 13 Ves. 180. And see *Eland* v. *Karr,* 1 East, 375; *Saunderson* v. *Gouldsb.* 80.

Sed vide ante, B. (d) 14; *Fair* v. *M'Iver,* 16 East, 130, 8; *Peele* v. *Northcote,* 7 Taunt. 479.

33. Assumpsit for goods sold, &c. plea set off and held, that interest on a bill of exchange accruing after writ sued out cannot be set off, otherwise defendant might gain a verdict by delay. *Fletcher* v. *Lee.* Ellenborough, C. J. Sittings after M. T. 1817.

D. Practice relative to Set off.

D. (a) *Form of set off.*

34. Bills of exchange and promissory notes paid by the defendant *for* the plaintiff, need not be specially set off. It is money paid to the plaintiff's use. *Ibid.*

35. And under a set off for money had and received, the defendant may give in evidence bills of exchange paid by him *to* the plaintiff, without proving that such bills have been paid. *Hebden* v. *Hartsink et alt.* 4 Esp. 46. Kenyon, C. J. 1801.

36. But where the defendant seeks to reclaim an over payment, he will not be allowed to surprize the plaintiff by giving it in evidence upon a set off for money had and received. *Hampton* v. *Jarratt,* 2 Esp. 560. Eyre, C. J. 1797.

37. Where in covenant for rent and fixtures defendant pleads *non est factum,* he cannot give notice of set off as upon a general issue: the set off must be pleaded. *Oldershaw, executor of Holmes* v. *Thompson,** 1 Stark. 311. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial, except upon the terms of amending and paying costs. *Ibid.*

D. (b) *How pleaded with other pleas.*

38. A defendant pleading the general issue to *part* of the declaration, and a *tender* to the residue, is entitled to give notice of set off. *Coulson* v. *Jones,* 6 Esp. 50. Ellenborough, C. J. 1806.

39. And *semble,* that where the general issue and also a special plea are pleaded to the *whole* declaration, the defendant is not precluded from giving *notice* of set off, though for the sake of convenience it is usual to *plead* it. *Ibid.*

D. (c) *Particulars of set off.*

40. Where an order is made on the defendant to deliver the particulars of his set off *forthwith,* the plaintiff cannot, if he has kept the particulars without applying to the court, object at the trial that they were not delivered till ten days subsequent to the order, after the plaintiff had subpœnaed his witnesses, and the cause stood in the paper for trial. *Lovelock* v. *Cleveley, gent. one, &c.* Holt. 552. Gibbs, C. J. 1817.

D. (d) *Replication.*

(See Appendix.)

D. (e) *Effect of set off upon collateral proceedings.*

41. A cross demand pleaded and allowed as a set off, cannot be the subject of a fresh action. *Hennell* v. *Fairlamb,* 3 Esp. 104. Kenyon, C. J. 1800.

And see post, pl. 45, Statutes, B. (l).

42. But if the set off exceed the original demand, an action lies for the surplus. *Ibid.*

43. A defendant is not obliged to set off his cross demand, even where he is sued for the balance of two separate accounts. *Brown* v. *Pigeon,* 2 Campb. 594. Ellenborough, C. J. 1811.

And see *Middleton* v. *Hill,* 1 M. & S. 240.

44. But where the defendant pleads the general issue with notice of set off, and does not appear at the trial, the plaintiff may either take a verdict for his whole demand, subject to a reduction in case the defendant will enter into a rule to bring no action for the set off; or for the balance, with a special indorsement on the *postea.* *Laing* v. *Chat-*

ham, 1 Campb. 252. Ellenborough, C. J. 1808.

45. Such indorsement will be a ground for staying proceedings in a cross action. *Ibid.*

And see ante, pl. 41; post, APPENDIX.

SHERIFF.

(And see ARREST, A. (c); ASSUMPSIT, pl. 50, 51; EXECUTION.)

A. HIS AUTHORITY.

B. DUTY.

(a) *Return of process.*

(b) *Assignment of bail bond.*

C. LIABILITY.

(a) *To the creditor.*

(b) *To the debtor.*

(c) *To their persons.*

A. AUTHORITY OF SHERIFF.

1. Defendant, sued by original, cannot be arrested between the return day, and the *quarto die post. Parrot* v. *Mumford, sheriff of Kent*, 2 Esp. 585. Eyre, C. J. Maidstone, 1797.

S. P. Bro. Abr. Proces, 169; *Gawen* v. *Ludlow*, Moore, 712; *Ellis* v. *Jackson*, 1 Lev. 143; S. C. 1. Sid. 229; S. C. 1 Keb. 718, 805; *Loveridge* v. *Plaistow*, 2 H. Bla. 29.

B. DUTY OF SHERIFF.

(And see ante, ARREST, A. (c); ASSUMPSIT, pl. 50, 51.)

B. (a) *Return of process.*

(And see ante, EVIDENCE, pl. 8, 9; post, SHIP, pl. 118, 9; 2 Wms. Saund. 47 l, m.)

2. If the defendant publicly follow his usual avocations, and the sheriff return *non est inventus*, an action lies against him. *Beckford* v. *Montague, esq. sheriff of Wilts*, 2 Esp. 475. Kenyon, C. J. 1796.

3. But the jury are not to give damage to the whole extent of the debt, where the original defendant is solvent. *Ibid.*

And see *Alford* v. *Tatnell*, 1 Mod. 170.

4. Where a party appoints his own bailiff, the sheriff cannot be ruled to return the writ. *Beckford* v. *Welby, esq. sheriff of Lincoln*, 2 Esp. 591. Kenyon, C. J. 1797.

S. P. *Hamilton* v. *Dalziell*, 2 Bla. 952; *De Moranda* v. *Dunkin*, 4 T. R. 119.

But see *Taylor* v. *Richardson*, 8 T. R. 505.

4. If, however, the writ be returned, the sheriff is liable for an escape. *Ibid.*

S. P. admit: *Taylor* v. *Richardson*, 8 T. R. 505.

N. An action cannot be maintained on a promise to pay bailiff for extra trouble in making an arrest. *Armstrong* v. *Partridge*, 2 Wentw. 538, 40.

And see 2 Roll. Abr. 266, l. 10; *ibid.* l. 50; *ibid.* Execution, A. (d); 17 Vin. Abr. Prescription, H. 1, and K. 2; post, SHIP, K. pl. 128, 145.

B. (b) *Assignment of bail-bond.*

5. An action for not assigning bail-bond is barred by the production of the rule for the allowance of bail. *Murray* v. *Durand*, 1 Esp. 87. Kenyon, C. J. 1794.

6. But the plaintiff may move to set aside such rule, if no bail bond was in fact taken. *Ibid.*

S. P. *How* v. *Lacy*, 1 Taunt. 119; *Bosanquet* v. *Simpson*, K. B. Tidd. 239.

And see *Pariente* v. *Plumbtree*, 2 Bos. & Pul. 35; *Allingham* v. *Flower*, *ibid.* 246; *Turner* v. *Carey*, 7 East, 607; *Jones* v. *Eamer*, 3 Anst. 675.

C. LIABILITY OF SHERIFF.

C. (a) *To the creditor.*

7. To charge a sheriff with money levied under a *fi. fa.* it is not sufficient to show that the levy was made by a known officer; the writ *or warrant* must be produced. *Wilson et alt. assignees of Warner*, v. *Norman, sheriff of Kent*, 1 Esp. 154. Kenyon, C. J. 1794.

8. The writ is not sufficient, the warrant should be produced. *M'Neil* v. *Perchard et alt. sheriffs of London*, 1 Esp. 263. Kenyon, C. J. 1795.

10. S. P. acc. *Lloyd* v. *Harris*, Peake, 174. Kenyon, C. J. 1793.

11. B. C. obtain credit from A. representing himself to be D. C. under which name he is arrested. Though the sheriff would be justified in detaining B. C. he is not bound to do so. *Morgan* v. *Brydges and another, sheriffs of Middlesex*, 2 Stark. 314. Abbott, J. 1818.

And the court of K. B. set aside a nominal verdict for the plaintiff. *Ibid.* and 1 B. A. 647.

12. In an action for a false return to mesne process, it is good defence to shew that the party rescued himself *by force.* *Fermer* v. *Phillips*, Holt, 537. Gibbs, C. J. 1817.

And see Com. Dig. Rescous. D. 4; *R.* v. *Sheriff of Middlesex*, 1 B. & A. 190.

13. An assertion *ante litem motam* by A. of his property in goods, which the sheriff has omitted to seize under an executrix against him, is evidence against the sheriff. *Tyler* v. *Duke of Leeds*, 2 Stark. 218. Ellenborough, C. J. 1817.

14. So an admission by A. of his having received notice of dishonour, is evidence against the plaintiff, who has suffered A. to escape. *Williams* v. *Bridges and another*, 2 Stark. 42. Abbott, J. 1817.

15. To connect the sheriff with the acts of the bailiff, it was held sufficient to produce the writ with the name of the bailiff indorsed, and shew that it is the custom of the office to indorse the name of the officer who is to execute the process. *Tealby* v. *Gascoigne*, 2 Stark. 202. Richards, C. B, York Summer Assizes, 1817.

16. S. P. contra *Morgan* v. *Brydges and another, late sheriff of Middlesex*, 2 Stark. 315. Abbott, J. 1818.

And see *Hill* v. *Sheriff of Middlesex*, 7 Taunt 1.

17. If the plaintiff calls the bailiff to make out their part of the case. he may be cross-examined by the council on the other side, though he is himself the real defendant. *Ibid.*

18. An indorsement on the writ, though returned and filed by the sheriff, is not evidence to connect him with the acts of the officer whose name is indorsed, without proof that it is the hand writing of some person connected with the sheriff's officer, or made by his authority. *Hill* v. *Leigh and Reay, sheriff of Middlesex*, Holt, 216. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial, 7 Taunt. 8.

19. The sheriff's return is evidence against him only as to those matters which the writ requires him to perform. *Ibid.*

20. But it was held to be sufficient to produce the office copy of the writ returned, with the name of the officer indorsed: it being shewn to be the practice in the sheriff's office to indorse the name of the officer to whom the warrant is directed.

S. P. *Blatch* v. *Archer, ibid.* Cowp. 63.

21. S. P. contra *Jones* v. *Wood, esq. and another*, 3 Camph. 228. Ellenborough, C. J. 1812.

22. A paper from the sheriff's office, requiring the officer to give instruction for making the return, is, however, a clear recognition of his authority. *Ibid.*

23. No action lies against the sheriff for forbearing to levy under a *fi. fa.* *Moreland* v. *Leigh and another, sheriffs of London*, 1 Stark. 388. Ellenborough, C. J. 1816.

24. Or for not having the money on, &c. after levying. *Ibid.*

25. After return of levy made, it is a good defence for sheriff to shew that he has paid over to assignees of the original defendant. It is not incumbent upon the sheriff to apply to amend his return. *Bridges* v. *Walford*, 1 Stark. 389; in notis. Burrough, J. Essex Summer Assizes, 1816.

And the court of K. B. refused a rule to set aside verdict. *Ibid.*

26. In an action against sheriff for extortion by his bailiff, under 32 Geo. II. c. 28. it was held that an examined copy of the precept to the sheriff with the return *cepi corpus* indorsed, whereupon the bailiff's name appeared, does not entitle plaintiff to give parol evidence of the warrant, even after notice to produce it; but some recognition by the sheriff of his bailiff's act must be shewn. *Martin* v. *Bell and another*, 1 Stark. 413. Ellenborough, C. J. 1816.

27. But the sheriff's acceptance of bail bond from his bailiff and return of *cepi corpus* in consequence, is sufficient

evidence of his adoption of the bailiff's acts. *Ibid.*

28. Where a lease and fixtures are taken in execution, the sheriff is bound to sell the fixtures separately, if he cannot find a purchaser for the whole. *Barnard and another* v. *Leigh and another;* 1 Stark. 43. Ellenborough, C. J. 1815.

29. If he retains the property in his hands on the ground that the sale effected by his broker is fraudulent, he cannot return "want of buyers." *Ibid.*

30. Under such circumstances, he ought to apply to the court to enlarge the return. *Ibid.*

31. But in an action for a false return the inadequate price accepted by the broker, together with the value of the fixtures, appears to be the true measure of damages. *Ibid.*

32. In an action against the sheriff for an escape, if the plaintiff aver that the the prisoner was indebted to him for *goods sold,* the averment must be strictly proved. *Parker* v. *Fenn and Bloxam, sheriffs of London,* 2 Esp. 477. n. Kenyon, C. J. 1788.

Sed vide *Gunter* v. *Cleyton,* 2 Lev. 85. *first resolution,* contra.

N. It seems to be sufficient to state that the plaintiff had a *good cause of action* against the prisoner, *Bentley* v. *Donnelly,* 8 T. R. 127.; and a declaration for an escape upon *final* process, need go back no farther than the judgment; *Evan* v. *Lloyd,* Cro. El. 877; so after *outlawry* upon *mesne* process; *Stanton* v. *James,* 1 Lutw. 108, 10.

33. In an action against the sheriff for money had and received, it is sufficient to prove, that the money was taken *colore officii* by a bailiff who had a warrant from the sheriff, without shewing that the money has been paid over to the sheriff. *Jons* v. *Perchard, et alt. sheriffs of London,* 2 Esp. 507. Kenyon, C. J. 1796.

34. In an action against the sheriff for not arresting a person on mesne process, the plaintiff must prove his cause of action against the original defendant in the same manner as he would have done in the original suit. *Gibbon* v. *Coggon, esq. sheriff of Essex,* 2 Campb. 188. Ellenborough, C. J. 1809.

35. In such action, notice to the under-sheriff's agent in town, of the party's being within the defendant's bailiwick, is not evidence of notice to the defendant. *Ibid.*

36. After a return of *fieri feci,* an action may be maintained against the sheriff for the money levied, without a previous demand. *Dale* v. *Birch and another, sheriffs of London,* 3 Campb. 347. Ellenborough, C. J. 1813.

37. But if the plaintiff's attorney, before action brought, has notice that the money lies ready for him, the court will stay the proceedings. *Ibid.*

38. The plaintiff in an execution may sue the sheriff for money had and received, if the latter retain more than his poundage, and is not bound to apply to the court. *Longdill* v. *Jones,* 1 Stark. 345. Ellenborough, C. J. 1816.

Acc. *Mildmay* v. *Smith,* 2 Saund. 243.

39. The sheriff cannot set up as a defence that the debt on which the judgment was obtained was fraudulent. *Tyler* v. *Duke of Leeds,* 2 Stark. 218. Ellenborough, C. J. 1817.

40. Where the plaintiff produces the writ, the defendant is not entitled to have the return read as part of the document. *Avery* v. *Bridges and another,* 2 Stark. 189. Holroyd, J. 1817.

41. But the defendant may prove that a rescue was returned. *Ibid.*

42. Such return would not, however, be conclusive, as between these parties. *Ibid.*

C. (b) *To the debtor.*

43. No action lies against the sheriff for extortion committed by an officer *not named in the warrant,* to whose lock-up-house the parties are brought upon being arrested. *George* v. *Perring et alt. sheriff of Middlesex,* 4 Esp, 63. Kenyon, C. J. 1801.

44. If, after a false return of *nulla bona* to a writ of *fi. fa.* the plaintiff take the defendant on a *ca. sa.*, he may nevertheless maintain an action against the sheriff. *Wordall* v. *Smith and another, sheriff of Middlesex,* 1 Campb. 332. Ellenborough, C. J. 1807.

C. (c) *To third persons.*

45. In trespass against a sheriff for

seizing goods under a *fi. fa.* the production of the *warrant* is sufficient, under the general issue, to connect the defendant with the act of the bailiff; it lies upon the defendant to prove the *writ*, in support of a plea justifying under it. *Grey* v. *Smith and another, sheriff of Middlesex*, 1 Campb. 387. Ellenborough, C. J. 1808.

46. A. sued out a *fi. fa.* against B., and employed an auctioneer to sell the goods seized by the sheriff. C., a stranger, claimed property in the goods and obtained a verdict for the amount in an action against the sheriff, bailiff, and auctioneer, and levied the damages upon the auctioneer. Held, that the auctioneer, not having been retained by the sheriff, could not maintain an action against him on an implied contract of indemnity, or for a contribution, although the sheriff received his poundage. *Farebrother* v. *Ansley and another, late sheriff of Middlesex*, 1 Campb. 343. Ellenborough, C. J. 1108.

D. LORDS OF FRANCHISES.

47. A return to the sheriff's mandate, purporting to be made by A., as lord of the franchise, is presumptive evidence that A. is lord. *Tyler* v. *Duke of Leed*, 2 Stark. 218. Ellenborough, C.J. 1817.

48. And evidence that B. has made the returns as A.'s bailiff during sixteen years, fixes A. with the acts of B. *Ibid.*

SHIP.

A. OWNERSHIP.

(a) *How acquired.*

(b) *How proved.*

(c) *Part owners.*

B. CHARTER PARTY.

(a) *Liability of owner.*

(b) *Liability of freighter.*

C. BILL OF LADING.

D. FREIGHT.

E. PASSAGE MONEY.

F. DEMURRAGE.

G. LIABILITY OF OWNER.

(a) *To the freighters of goods.*

(b) *For repairs, stores, &c.*

(c) *For misfeasance.*

H. LIABILITY OF MASTER.

I. AUTHORITY OF MASTER.

K. SEAMEN'S WAGES.

L. GENERAL AVERAGE.

M. SHIP-BUILDER.

(a) *Liability for negligence.*

A. OWNERSHIP.

A. (a) *How acquired.*

1. A British subject cannot purchase a British ship captured by the enemy. *Woodward* v. *Larking*, 3 Esp. 286, 8. Eldon, C. J. 1801.

Sed vide 48 Geo. III. cap. 70; 49 Geo. III. cap. 41.

2. A ship is not of the built of Russia within the navigation act, which, having been originally constructed in another country, was repaired there at an expense of more than two thirds of her value; although, by the law of Russia, she was, under these circumstances, to be considered a Russian ship. and was accordingly navigated as such. *Redhead and another* v. *Cater*, 4 Campb. 188. Ellenborough, C. J. 1815.

3. Conveyance of a ship is not void because the vendor is stated therein as conveying, in the 3d instead of the 1st person as in the form directed by the act. *Taylor* v. *Kinloch*, 1 Stark. 175. Ellenborough, C. J. 1816.

4. A ship assigned by A. to B. for a valuable consideration, is registered in the name of B., and a certificate of such registry is put on board. She remains under the controul of A. who becomes bankrupt. Dub. whether the property passes to A.'s assignees; and a case was directed. *Hay and another* v. *Monkhouse and another*, Holt. 603. Wood, B. Durham. 1817.

And see *Mair* v. *Glennie*, 4 M. & S. 240; *Robinson* v. *Macdonnel*, Selw. N. P. 1142; *Dixon* v. *Ewart*, 3 Meriv. 322; 1 Buck. 95, S. C.

5. *Semble*, that in cases of extreme urgency the captain may *sell* the vessel for the benefit of the owners. But in such a case it must appear that the sale was effected *optimâ fide;* and it is sufficient to throw a suspicion on the transaction, that one of the surveyors employed became a sub-purchaser. *Hayman* v. *Moltan, Kirby, et alt.* 5 Esp. 65. Ellenborough, C. J. 1803.

S. C. Abbott, L. S. 7.

And see *Andrews* v. *Glover*, Abbott, L. S. 9; *ibid.* 252.

6. He cannot sell the *cargo* at a foreign port, on the ground that it has become impossible to prosecute the voyage, and that this is the most beneficial course for the owner. *Wilson* v. *Millar and others*, 2 Stark. 1. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

And see Abbott, L. S. part 1, chap. 1, sect. 2.

7. Where a vessel is recaptured, the mate, in the absence of the master, may hypothecate the ship, to pay the salvage. *Parmeter* v. *Todhunter*, 1 Campb. 541. Ellenborough, C. J. 1808.

8. Or he may sell a part of the cargo. *Ibid.*

And see The Gratitudine, Mazzola, 3 Rob. A. R. 240; Abbott, L. S. 153; post, pl. 108, 109, 110, 111.

A. (b) *How proved.*

9. In trover for a ship, if the plaintiff produce the original register, and attempt, unsuccessfully, to deduce a title under it, he cannot afterwards rely upon his possession. *Sherriff* v. *Cadell*, 2 Esp. 617. Kenyon, C. J. 1797.

10. The bill of sale of vessels employed exclusively in inland navigation, need not be registered. *Laroche, bart. and others*, v. *Wakeman and another*, Peake, 140. Kenyon, C. J. 1792.

11. Where every thing required to be done by the owners in order to transfer their interest is regularly performed, the neglect of the custom-house officer in London, in making the proper entries, will not avoid the sale, or render them liable as owners to a third person. *Ratchford* v. *Meadows et alt.* 3 Esp. 69. Eldon, C. J. 1799.

And see *Heath* v. *Hubbard*, 4 East, 110, 58; *Bloxam* v. *Hubbard*, 5 East, 407; S. C. 1 Smith, 487, 90; *Underwood* v. *Miller*, 1 Taunt. 387; *Hubbard* v. *Johnstone*, 3 Taunt. 177, 208; *Addis* v. *Baker*, 1 Anst. 222.

12. Where a ship is purchased by a British subject from a foreigner, the production of the copy of the register from the custom-house in which the vendee is stated to be the owner, is evidence of property, without producing the bill of sale. *Woodward* v. *Larking*, 3 Esp. 287. Eldon, C. J. 1801.

13. To prove the transfer of a ship in France, where it is the usage to lodge the bill of sale with an officer, and to obtain a copy from a notary, such copy is evidence without proof of its having been examined with the original. *Ibid.*

14. *Semble*, that the adjudication of a prize court acting in a neutral country under a commission from a belligerent, *if acquiesced in by the neutral*, is sufficient to vest the property of the prize in the captor. *Smith* v. *Surridge*, 4 Esp. 25, 7. Kenyon, C. J. 1801.

15. Contra, *Donaldson* v. *Thompson*, 1 Campb. 429. Ellenborough, C. J. 1808.

16. A state is neutral where the form of an independent neutral government remains, though the country be occupied by the forces of a belligerent. *Ibid.*

And see *Havelock* v. *Rockwood*, 8 T. R. 72, 68, 74; the Flad Oyen, Martinson, *ibid.* 270, n. and 1 Rob. Adm. Rep. 135, 40, 4; the Christopher, Slyboom, 2 Rob. A. R. 209; the Harmony, *ibid.* 210, n., *Oddy* v. *Bovill*, 2 East, 473.

17. A bill of sale made to a person in trust for certain *unnamed* underwriters, is not *primâ facie* void, as contrary to the register acts. *Heath* v. *Hubbard*, 4 Esp. 205. Ellenborough, C. J. 1802.

And the court refused to set aside the verdict, *ibid.* and 4 East, 110.

18. *Semble*, that an affidavit for register made by A. and B., stating that A., B., and C. are the owners, is not evidence to affect C. *Ditchburn* v. *Spracklin, Diggby, Baker, and Saun-*

ders, 5 Esp. 31. Ellenborough, C. J. 1803.

19. Held, that a register in the names of A. and B., obtained on the oath of A. is *primâ facie* sufficient to charge both as owners. *Stokes* v. *Carne and others*, 2 Campb. 339. Ellenborough, C. J. 1809.

20. But it appears to be now settled that the register is in no case evidence of ownership against a party who is not shewn to be apprized of its existence. *Frazer* v. *Hopkins and Long*, 2 Campb. 170. Mansfield, C. J. 1809.

The court refused a rule to set aside a nonsuit; *ibid.* and 2 Taunt. 5.

And see *Tinkler* v. *Walpole*, 14 East, 226; Abbott, L. S. 85; post, 102, 112, 3.

21. In an an action against A. and B., owners of a ship, it is *primâ facie* evidence of ownership to put in an undertaking to appear for them, given before the commencement of the action by the person who subsequently acted as their attorney in defending it, in which he describes them as owners. *Marshall and another* v. *Cliff and another*, 4 Campb. 133. Ellenborough, C. J. 1815.

A. (c) *Part owners.*

(And see post, pl. 100.)

22. A managing part-owner possesses no implied authority to bind his co-part-owners by an order for insurance. *Bell* v. *Humphries and others*, 2 Stark. 345. Ellenborough, C. J. 1818.

And see *Campbell* v. *Stein*, 6 Dow. 135.

23. But where they are also general partners, an order given by one binds all. *Hooper and another* v. *Lusby and others*, 4 Campb. 66. Ellenborough, C. J. 1814.

24. And it was ruled that one part-owner has power to pledge the joint credit for repairs. *Gleadon* v. *Tinkler and others*, Holt, 586. Richards, C. B. York, 1817.

25. And it was held that evidence of an express discharge from acting as managing owners and ordering repairs was inadmissible, unless communicated to the plaintiff. *Ibid.*

26. A bill delivered by plaintiff, an attorney, for business done in respect of the ship, in which he charges the defendant with 3-7th of the amount, is *primâ facie* evidence against the plaintiff that the action is brought to recover the defendant's share only. *Pasmore, gent.* v. *Bousfield*, 1 Stark. 296. Ellenborough, C. J. 1816.

27. But where the several part-owners employ a joint agent, they are jointly liable for the whole. *Ibid.*

28. If the defendant pleads in abatement the non-joinder of the assignees of his co-promisor, the assignment must be proved, unless the fact has been admitted by the plaintiff. *Ibid.*

29. The omission of the name of one of the assignees would falsify the plea. *Ibid.*

30. A part-owner ordering supplies in his own name, cannot plead the non-joinder of part-owners, of whose existence the plaintiff was not apprized. *Baldney and another* v. *Ritchie*, 1 Stark. 338. Ellenborough, C. J. 1816.

S. P. *Doo* v. *Chippenden*, Abbott, L. S. part 1. chap. 3. sect. 8. Sed vide *Dubois* v. *Ludert*, 1 Marsh. 246.

B. CHARTER PARTY.

(And see ante, AGENT, pl. 90; CONDITIONS PRECEDENT, pl. 1; INSURANCE, pl. 163.)

B. (a) *Liability of freighter.*

(And see post, F.)

31. A freighter omitting to supply a cargo is liable for the freight of an *average* cargo of the articles with *some* of which he engaged to fill the ship. *Thomas* v. *Clarke and Todd*, 2 Stark, 450. Abbott, C. J. 1818. Post. pl. 37, 39.

32. The dead freight is to be calculated according to the actual capacity of the vessel. The owner is not bound by the number of tons burthen mentioned in the charter-party, unless the misrepresentation were fraudulent. *Ibid.*

33. Where, in the commencement of the instrument, A. proposes to contract for himself and his partner B., the partnership is bound, although the word "freighter," in the singular, is used throughout. *Ibid.*

34. If a ship chartered for a voyage of *trade or warfare* be lost on a voyage of *discovery*, undertaken without the consent of the owners or their agent,

case will lie against the freighter. *Lewin and others* v. *East India Company*, Peake, 241. Kenyon, C. J. 1794.

35. So if the consent of an agent and part-owner be obtained by collusion with the freighter. *Ibid.*

S. C., upon a second trial between the parties, Abbott, L. S. 281.

36. Where a ship, let to freight for so much per ton per month, for such time as she shall be employed and engaged by the freighter, is detained before the conclusion of her employment, for a supposed breach of blockade, in attempting, by the direction of the supercargo, to enter the blockaded port, the owners are entitled to be paid for the time of such detention. *Moorsom* v. *Greaves and others*, 2 Campb. 627. Ellenborough, C. J. 1811.

37. A freighter covenanting to provide a full and complete cargo, consisting of " copper, tallow, and hides, or other goods," is not bound to provide any copper; although, from the want of it, the ship is obliged to keep in her ballast and does not make so advantageous a freight as she otherwise would. *Moorsom* v. *Page*, 4 Campb. 103. Ellenborough, C. J. 1814.

38. Under a covenant " to pay freight on skins, by the pound, net weight, at the King's beam," freight is due on the outside skins in which the packages are contained. *Ibid.*

39. A covenant to supply a full cargo of cotton, and to pay freight at certain rates for round bales and compressed bales, is broken, if from omitting to recompress the bales, according to the custom of the port of lading, the vessel has not a sufficient cargo; and the freighter will be liable for dead freight. *Benson* v. *Schneider and others*, Holt, 416. Burrough, J. 1816.

And the court of C. P. discharged a rule for a new trial. *Ibid.*

B. (b) *Liability of owner.*

40. An exception of the owner's liability of " *perils of the seas*" covers a loss arising from the vessel's running foul of another by misfortune. *Buller and others* v. *Fisher and others*, 3 Esp. 67. Kenyon, C. J. 1799.

S. C. Abbott, L. S. 266, 8.

Acc. *Pickering* v. *Barclay*, 16 Vin. 203; S. C. 2 Roll. Abr. 248; S. C. Style, 132.

And see *Barton* v. *Wolliford*, Comb. 56; Dig. 4. 9. 3. 1; Dig. 9. 2. 29. 2, *et* 4. Pothier, Contrats de Louage maritime, part 2. sect. 2. num. 155.

41. A covenant that the vessel shall be provided with every thing needful and necessary for the voyage, extends to a bill of health. *Costerton* v. *Levy*, 1 Stark. 212; 4 Campb. 389, and Holt, 167. Gibbs, C. J. 1819.

C. Bill of lading.

42. If a bill of lading contain a memorandum, " to be discharged in 14 days, or pay five guineas a day demurrage," evidence of usage may be adduced to shew that *working* days, and not *running* days, are meant. *Cochran* v. *Retberg et ali.* 3 Esp. 121. Eldon, C. J. 1800.

And see *Donaldson* v. *Forster*, Abbott, L. S. 222.

43. The acceptance of goods creates an implied contract to fulfil all the stipulations on the part of the shipper and his consignee or assigns, contained in the bill of lading. *Dobbin* v. *Thornton*, 6 Esp. 16. Ellenborough, C. J. 1806.

Acc. *Lees* v. *Yates*, 3 Taunt. 387, 94; *Jesson* v. *Solly*, 4 Taunt. 52. And see post, D. (a); *Grote* v. *Milne*, 4 Taunt. 133.

44. But where the captain of a vessel, chartered at a gross sum, signs bills of lading for the cargo, at a rate of freight amounting to a less sum, the ship owner has no lien beyond the freight specified in the bills of lading. *Mitchell* v. *Scaife*, 4 Campb. 298. Ellenborough, C. J. 1815.

45. The indorsee of a bill of lading, without notice of any circumstances which render it not fairly and honestly assignable, may recover in trover against the vendor who has stopped the goods *in transitu*; although he may have known that the consignee had merely accepted a bill for the amount, which was running at the time of the indorsement. *Cuming* v. *Brown*, 1 Campb. 104. Ellenborough, C. J. 1807.

And the court discharged a rule for a new trial. *Ibid.* 180, c. and 9 East, 506.

And see *Appleby* v. *Pollock*, Abbott, L. S. 394; *Wright* v. *Campbell*, 1 Bla. 628; S. C. 4 Burr. 2046; *Newsom* v. *Thornton*, 6 East, 16; S. C. 2 Smith, 207.

46. But he cannot recover damages beyond the amount of his actual advances. *Ibid.*

47. A bill of lading, whereby the captain undertakes to deliver the cargo to the shipper or his assigns, is not transferable by a mere indorsement without consideration. *Waring* v. *Cox*, 1 Campb. 369. Ellenborough, C. J. 1808.

48. And such an indorsement, though made by the consignor for the purpose of stopping the goods *in transitu*, gives no right of action to the indorsee against the captain. *Ibid.*

S. C. Abbott, L. S. 227.

49. A. draws a bill of exchange on J. S. payable to the order of B. which he remits to B. with a bill of lading of coffee, which has a special indorsement, directing and appointing the goods to be delivered to J. S. in case he shall accept *and pay the draft*, if not, to the holder of the draft. The draft and bill of lading are sent to J. S. who accepts, but does not pay. In the mean time he indorses the bill of lading for a valuable consideration to C. Held, that B., the holder of the draft when it was dishonoured, might maintain trover for the coffee against C. *Barrow* v. *Coles*, 3 Campb. 92. Ellenborough, C. J. 1811.

Sed vide 4 East, 219, *Coxe* v. *Harden*; 1 Smith, 20, S. C.; *Waller* v. *Montgomery*, 3 East, 585, 9, 90, 1, 2; Anon. Paley, 243; *Siffken* v. *Wray*, 6 East, 371; S. C. 2 Smith, 480.

50. The right to stop *in transitu* is not taken away by an assignment of the bill of lading for a valuable consideration, with notice of the insolvency of the consignee. *Virtue and another* v. *Jewell*, 4 Campb. 31. Ellenborough, C. J. 1814.

51. A. ships goods and sends the bill of lading to B., whom he desires to dispose of the goods; but he omits to indorse the bill of lading. He afterwards sends an indorsed bill of lading to C., who has given value, after notice of transaction. C. cannot claim the goods from the vendee of B. *Dick* v. *Lumsden*, Peake, 189. Kenyon, C. J. 1793.

52. Where the freight is tendered and the consignee is ready to take the goods over the ship's side, the master cannot detain the goods for *half-wharfage*, which he is himself liable to pay in respect of goods so delivered, as a compensation for the advantage which the vessel derives from being moored at the wharf. *Bishop and others* v. *Ware*, 3 Campb. 360. Ellenborough, C. J. 1813.

And see *Syeds* v. *Hay*, 4 T. R. 260, where this claim is called *moorage-duty*.

53. Merchants receive a bill of lading from a stranger who requests them to effect insurance; declining the transaction, they indorse the bill of lading to a friend of the consignor, who fails. The merchants are liable for the value. *Corlett* v. *Gordon and another*, 3 Campb. 472. Ellenborough, C. J. 1813.

54. A regular bill of lading is made out, charging the usual freight, but the merchant agrees with the captain to pay him 100l. in case the goods are smuggled into Russia; this sum may be recovered on the common count for freight. *Hedley* v. *Lapage*, Holt, 392. Park, J. 1816.

D. Freight.

(And see ante, Condition precedent, A. 1. 2; Agent, pl. 90; Insurance, pl. 199.)

D. (a) *By whom payable.*

55. Held, that where the master waves his lien for the freight by parting with the possession, he must resort for payment to the original consignee, or first indorsee of bill of lading, if made to shipper's order, and that he cannot, where the original consignee or first indorsee is known, sue the party to whom such consignee transfers his interest in the goods. *Artaza* v. *Smallpiece*, 1 Esp. Kenyon, C. J. 1793.

S. P. the Theresa Bonita, De Jong. 4 Rob. A. R. 236.

56. But in a late case where the goods were deliverable to the order of A. or his assigns, and the bill of lading was indorsed by A. to B., and by him to C.,

to whom the goods were delivered, it was held, that C., by becoming assignee of the bill of lading, *and receiving the goods*, had adopted the contract. *Cock* v. *Taylor and another*, 2 Campb. 587. Ellenborough, C. J. 1811.

And the court of K. B. refused a rule to set aside a verdict for the master, and denied the case of *Artaza* v. *Smallpiece*, 13 East, 399; S. C. Abbott, L. S. 296.

57. So, although the indorsee receives the goods from the London Docks, and pays over the proceeds to the indorser before freight is demanded. *Bell and another* v. *Kymer and others*, 3 Campb. 545. Mansfield, C. J. 1813.

And the court of C. P. (Gibbs then being C. J.) discharged a rule for a new trial.

And see *Wilson* v. *Kymer*, 1 M. & S. 157; *Moorsom* v. *Kymer*, 2 M. & S. 303; S. C. 3 Campb. 549, n.; post, E. pl. 75.

58. Held, that the shipper of goods, part of which have been wrongfully sold by the captain, may set-off the value of those sold against the claim of freight, waiving the tort; and that even against the assignee of the freight. *Campbell* v. *Thompson*, 1 Stark. 490. Ellenborough, C. J. 1816.

D. (b) *When due.*

59. A clause in a bill of lading acknowledging that freight has been paid at the port of lading, or that freight is to be paid there, will not subject the shipper to the payment of freight, if the vessel be lost on the voyage. *Mashiter* v. *Buller and another*, 1 Campb. 84. Ellenborough, C. J. 1807.

60. And if the freight have been paid at the time of shipping the goods, it may be recovered back. *Ibid.*

Cont. Anon. 2 Show. 283, 3d resolution. And see dictum of Chambre, J. in *Blakey* v. *Dixon*, 2 Bos. & Pul. 321; *Andrew* v. *Moorehouse*, 1 Marsh. 122.

61. Freight cannot be recovered where the stipulated voyage has not been performed; and a promise to pay the master a compensation, *pro ratâ*, for carrying goods a part of the voyage, will not be implied, unless they are voluntarily accepted by the consignee at a place short of the port of destination. *Osgood* v. *Groning*, 2 Campb. 466. Ellenborough, C. J. 1810.

62. Taking possession of goods on the behalf of the consignee by consent, without prejudice to the rights of the parties, after a bill for an injunction to restain the master from tortiously disposing of them, is not such a voluntary acceptance. *Ibid.*

63. The owner of a foreign vessel bringing goods to this country in violation of the navigation act, cannot recover freight. *Blank* v. *Solly*, Holt, 554. Gibbs, C. J. 1817.

64. Although the defendants accepted the cargo on a treasury order, directing the cargo to be restored on condition of its being exported. *Ibid.*

And the court discharged a rule for a new trial, 1 Moore, 531.

And see *Muller* v. *Gernon*, 3 Taunt. 394.

S. C. Abbott, L. S. 338, 40.

65. A covenant for payment of freight on delivery of goods is not discharged by the master's taking from the freighter's agent, a bill on a third person which is not duly paid, although the agent fail with the amount of freight in his hands. *Marsh* v. *Pedder and others*, 4 Campb. 257. Gibbs, C. J. 1815.

66. *Secus*, if a cash payment being offered, the master prefers a bill. *Ibid.*

67. Held, that a captain who enters personally into engagements on account of his ship, has a lien upon the freight for his disbursements, the amount of which he may recover from a consignee, who pays the freight to the owner after notice of the captain's claim. *White* v. *Baring, et alt.* 4 Esp. 22. Kenyon, C. J. 1801.*

Contra. *Hussey* v. *Christie*, 9 East, 426; S. C. 13 Ves. 594; *Smith* v. *Plummer*, 1 B. & A. 575.

68. A policy on money lent to the captain, *payable out of the freight*, is illegal upon the face of it; and the assured can neither sue for the loss, nor recover back the premium. *Wilson* v. *Royal Exchange Assurance Company*, 2 Campb. 626. Ellenborough, C. J. 1811.

Sed vide *King* v. *Glover*, 2 N. R. 206.

And see Pothier Traité du Contrat d'Assurance, ch. 1. sect. 2. num. 36, 9.

69. The payment of freight is not to be guided by the weights expressed in

the margin of the bill of lading, but by the actual weights at the King's beam. *Geraldes* v. *Donison*, Holt, 346. Gibbs, C. J. 1816.

70. And if the consignee, in order to obtain possession of his goods, pay according to the gross weights, he may recover the difference. *Ibid.*

E. Passage money.

71. Where on a voyage from London to the West Indies it is usual to pay the passage money, money so paid cannot be recovered in the event of the loss of the vessel on her w y to an out-port, which is the ultimate point of departure. *Gillan, widow,* v. *Simpkin*, 4 Campb. 241. Gibbs, C. J. 1815

And see *Andrew* v. *Moorhouse*, 5 Taunt. 435.

72. The master of a vessel has a lien upon the luggage of . passenger for the passage money, whether the price have been settled between the parties or not; but he has no right to detain the person of the passenger, or the clothes which he is actually wearing. *Wolf* v. *Summers*, 2 Campb. 631. Lawrence, J. 1811.

And see Abbott, L. S. part III. cap. 3. sect. 11.

73. Where the captain dies before the commencement of the homeward voyage, his estate is entitled to the benefit of any contract he may have entered into for the conveyance of passengers. *Siordet and another, executors, &c.* v. *Brodie*, 3 Campb. 253. Bayley, J. 1812.

74. But after his death, contracts made by his successor are for his own benefit. *Ibid.*

F. Demurrage.

(And see *Brounker* v. *Scott*, 4 Taunt. 1.)

75. A vessel chartered from A. to B. to be allowed 41 days *at A. and B.* and to pay demurrage for every day beyond, is not liable for demurrage in respect of a detention at an intermediate port. *Marshall* v. *De la Torre*, 1 Esp. 367. Kenyon, C. J. 1795.

Sed vide *Donaldson* v. *Forster*, Abbott, L. S. 222; *Lannoy* v. *Werry*, 2 Bro. Parl. Ca. 60; *Jamieson* v. *Laurie*, 6 Bro. Parl. Ca. 474.

76. Detention of vessel *ex delicto*, will not support a general count for demurrage. *Harrison* v. *Wilson*, 2 Esp. 708. Kenyon, C. J. 1798.

And see *Liddard* v. *Lopes*, 10 East, 526.

77. Evidence of usage is admissible to shew that where a vessel is to be discharged in 14 days, or pay five guineas a day demurrage, *working* days and not *running* days are to be understood. *Cochran* v. *Retberg et alt.* 3 Esp. 121. Eldon, C. J. 1800.

78. In an action for demurrage, according to the terms of a bill of lading, "to deliver to order or assigns," it was held, that by accepting the goods, the party binds himself to the performance of all the conditions of the bill of lading. *Dobbin* v. *Thornton*, 6 Esp. 16. Ellenborough, C. J. 1806.

And see ante, D. 53; *Jesson* v. *Solly*, 4 Taunt. 52.

79. Goods are consigned by the bill of lading to merchants whose residence is known. No notice to them of the ship's arrival is necessary to render them liable for demurrage. *Harman* v. *Mant and others*, 4 Campb. 161. Gibbs, C. J. 1815.

80. A *fortiori* where the consignees are indorsees of the bill of lading. *Harman* v. *Clarke and others*, 4 Campb. 159. Gibbs, C. J. 1815.

81. Where, by the terms of a charter-party, the freighter is allowed 40 days after reporting at the custom-house to unload the vessel, with the option of keeping her 10 days more at 5l. per day demurrage, the demurrage attaches where the vessel is detained beyond the 40 days, though prevented from discharging by the crowded state of the London Docks. *Randall* v. *Lynch*, 2 Campb. 352. Ellenborough, C. J. 1810.

And see *Struck* v. *Tenant*, Abbott, L. S. 196; *Leer* v. *Yates*, 3 Taunt. 387.

82. In a general ship, if the consignee by the bill of lading undertake to pay demurrage, it is no excuse that he was prevented from taking his goods, by the circumstance of their being stowed under the goods of other consignees. *Harman* v. *Gandolph*, Holt, 35. Gibbs, C. J. 1815.

83. It is no defence to an action for demurrage that the delay arose from an unlawful act of custom-house officers. *Bessey* v. *Evans*, 4 Campb. 131. Ellenborough, C. J. 1815.

84. And if the detention extend beyond the ten days, the owner may recover the subsequent demurrage upon the freighter's implied covenant, to redeliver the vessel at the expiration of that time.

S. C. in K. B. upon a motion in arrest of judgment. *Ibid.* and 12 East, 179.

85. And *primâ facie* the sum agreed upon for the stipulated days of demurrage, shall be the measure of the compensation for the subsequent detainer. But it is open to the respective parties to shew, that greater or less damage has been sustained. *Moorson* v. *Bell*, 2 Campb. 616. Ellenborough, C. J. 1811.

86. Where, however, the vessel was to unload "within the *usual* time," and it was averred and admitted that the usual time was seven days, but it appeared that, on account of the crowded state of the London docks, she could not be discharged till two months after her arrival, that if the duties had been immediately paid upon the cargo, which consisted of wines, it might have been landed sooner, but that such large cargoes had always been bonded, it was ruled, that the defendant had not broken his covenant. *Rodgers* v. *Forester*, 2 Campb. 483. Ellenborough, C. J. 1810.

87. So where a bill of lading is silent as to the time within which the goods are to be unloaded, no action will lie upon the implied undertaking to unload them within the usual time, where the consignee is prevented from doing so by the state of the docks, without any fault of his own. *Burmester* v. *Hodgson*, 2 Campb. 488. Mansfield, C. J. 1810.

88. The consignee is liable for the delay occasioned by the necessity of applying to the treasury for a licence to land particular goods. *Hill* v. *Idle*, 4 Campb. 327, 1 Stark. 111. Ellenborough, C. J. 1815.

89. So where a certain number of days is allowed in a charter-party for loading, the freighter is liable for a subsequent detention for that purpose, though the loading within the specified period was rendered impossible by the weather. *Barrett* v. *Dutton and another*, 4 Campb. 335. Gibbs, C. J. 1815.

S. P. *Thompson* v. *Wagner*, *ib.* (n). Kenyon, C. J. 1801.

90. But the freighter is not liable for a delay in obtaining her clearances, which it is the business of the ship-owner to procure. *Barret* v. *Dutton and another*, 4 Campb. 335. Gibbs, C. J. 1815.

G. Liability of owner.

G. (a) *To the freighters of goods.*

91. An owner covenants that the vessel shall be furnished with every thing needful and necessary for the voyage, is bound to furnish her with any document (a bill of health) which is required for her immediate admission into the port mentioned in the charter-party. *Levy* v. *Costerton*, 4 Campb. 389. Holt, 167. Gibbs, C. J. 1816.

92. Where a ship has been advertised for a particular voyage, the owner is bound to give notice of any intended alteration to every shipper. *Peel* v. *Price*, 4 Campb. 243. Gibbs, C. J. 1815.

93. The owners of goods captured in consequence of a deviation, are entitled to recover from the owners of the ship only the prime cost with the shipping charges, and not the expense of effecting insurance upon them. *Parker and others* v. *James and another*, 4 Campb. 112. Ellenborough, C. J. 1814.

94. Although there be proof that the goods, at the time of the loss, were inhanced in value beyond their first price. *Ibid.*

95. The owner of a vessel let to freight for a particular voyage, is not liable on the contract of the master, for the non-delivery of goods; the latter, though originally appointed by the owner, must be taken, *pro hâc vice*, to be the agent of the freighter only. *James* v. *Jones and another*, 3 Esp. 27. Kenyon, C. J. 1799.

S. C. more fully reported, Abbott, L. S. 23.

96. The non-arrival furnishes no ground for presuming negligence. *Boy-*

son v. *Wilson*, 1 Stark. 236. Ellenborough, C. J. 1816.

97. There is no implied undertaking on the part of the owner that a bill drawn by the master on a third person, for advances for the ship's use, shall be honoured. *Harder* v. *Brotherstone and another*, 4 Campb. 254. Gibbs, C. J. 1815.

98. A chartered ship is in want of money for necessary disbursements. A. being shewn the freighter's covenant to furnish what money might be required for the necessary disbursements of the ship, advances the requisite sum and takes a bill drawn by the master on the freighter. Held, that on this bill being dishonoured, the owner was not liable for any part of the amount. *Harder* v. *Brotherstone and another*, 4 Campb. 255. Gibbs, C. J. 1815.

Vide *Cary* v. *White*, 1 Bro. Par. Cas. 284, first edition; 5 vol. 325, of second edition.

G. (b) *For repairs, &c.*

99. *Semble*, that an affidavit for register, made by B., which affirms that A. and B. are owners, is not evidence against A. *Ditchburn* v. *Spracklin and others*, 5 Esp. 31. Ellenborough, C. J. 1803.

And see ante, Evidence, pl. 289; Partner, pl.

100. To an action against A. for stores supplied, he pleads the non-joinder of B. in abatement. The register is not evidence that A. and B. are co-owners. *Flower* v. *Young*, 3 Campb. 240. Ellenborough, C. J. 1812.

S. C. Abbott, L. S. 86.

101. S. P. *Smith* v. *Fuge*, 3 Campb. 456. Ellenborough, C. J. 1813.

And see *Tinkler* v. *Walpole*, 14 East, 226; *M'Iver* v. *Humble*, 16 East, 169.

102. In an action on a policy of insurance, the register is no evidence of interest. *Pirie* v. *Anderson*, 3 Campb. 242. C. P. M. T. 1812.

103. Where a person who has furnished a vessel with cordage, takes a bill for the amount from the managing owner, and renews that bill upon its being dishonoured, the other part-owners are discharged. *Reed* v. *White and others*, 5 Esp. 122. Ellenborough, C. J. 1804.

And see *Smith* v. *De Silva*, Cowper, 469; ante, Partners, pl. 70.

104. An agreement between a lighterman and his owner, that the former shall receive one half of the *net profits*, makes them jointly liable for repairs. *Dry* v. *Boswell*, 1 Campb. 329. Ellenborough, C. J. 1808.

105. But if the agreement be, that the lighterman shall retain one half of the *gross proceeds* for his labour, he can be charged upon his own contract only. *Ibid.*

And see ante, Partners, pl. 2, 3, 4, 5, 9; Appendix.

106. Where a vessel is bound for a port in which a bill of health is always required, the owners are liable for the expense and delay occasioned by the want of such a document, under a covenant with the freighter that the vessel shall be sufficiently furnished with every thing needful for the voyage in question. *Levi* v. *Costerton*, Holt, 167. Gibbs, C. J. 1816.

107. It is no excuse for the non-delivery of goods agreeably to the bills of lading, that the vessel was wrongfully detained for a supposed violation of the revenue laws. The ship-owner has his remedy over against the officers. *Gosling* v. *Higgins*, 1 Campb. 451. Ellenborough, C. J. 1808.

S. P. as to demurrage, ante, F. 83.

108. Under circumstances which render it very improbable that a vessel will be able to reach her port of destination, the captain possesses no implied authority to sell the cargo on account of the shippers; and such a sale, though made *bond fide* with a view to the interest of the concerned, is a tortious conversion. *Van Omeron* v. *Dowick and others*, 2 Campb. 42. Ellenborough, C. J. 1809.

109. S. P. recognized in *Joseph and others* v. *Knox*, 3 Campb. 332. Ellenborough, C. J. 1812.

110. He has no right to sell any part of the cargo, without urgent necessity. *Campbell* v. *Thompson*, 1 Stark. 490. Ellenborough, C. J. 1816.

And see ante, pl. 5, 6, 7, 8.

111. The parties whose goods are sold may set off the value even against an assignee of the freight. *Ibid.*

112. In an action for stores furnished by the captain's order, it was once held, that the register, purporting to have been obtained by all the defendants on the oath of one of them, is *primâ facie* evidence to charge them as owners. *Stokes* v. *Carne and others*, 2 Campb. 339. Ellenborough, C. J. 1809.

113. It has, however, been determined that entries in the custom-house books in London, and at the out-port to which the vessel belongs, stating that she was transferred by the original owner to the defendants, are *not* even *primâ facie* evidence of ownership in the defendants. *Frazer* v. *Hopkins and Long*, 2 Campb. 170. Mansfield, C. J. 1809.

Rule to set aside nonsuit refused in C. P. 2 Taunt. 5.

And see *Tinkler* v. *Walpole*, 14 East, 226; ante, PARTNER, pl. 14.

114. The owner of a packet-boat employed by government, but of which he receives the earnings, is liable for the amount of stores furnished for the vessel by the orders of a captain, appointed by the postmaster-general. *Stokes* v. *Carne*, *ubi supra*.

And see *Parish* v. *Crawford*, 2 Stra. 1251; more fully reported, Abbott, L. S. 22, 5.

115. The owner is liable for money supplied to the captain in a foreign port, provided it be absolutely necessary for the use of the vessel. *Rocher* v. *Busher* 1 Stark. 27. Ellenborough, C. J. 1815.

116. But the owners are not liable for money taken up by the captain, except for sums specifically advanced for the use of the vessel. *Palmer and others* v. *Gooch*, 2 Stark. 428. Abbott, C. J. 1818.

117. Where, therefore, the captain borrows 1700l. as money to be applied to the use of the ship, but the repairs amounting only to 950l., the captain's private account is debited with the balance, the owner cannot be sued by the lender for the 950l. *Ibid.*

And see *Sir Humphrey Jervis's case*, Abbott, L. S. part 2, chap. 3. sect. 6.

118. The defendant bought a ship taken in execution under a *fi. fa.* in 1805; but not having paid the whole of the purchase-money, the sheriff did not execute a regular assignment till 1810. The defendant was, however, immediately put into possession, and got the vessel registered in his own name. In 1806, he chartered her to the captain for three years, and interfered no more in the business. Held, that the defendant was not liable for stores ordered by an agent of the captain during the three years. *Frazer* v. *Marsh*, 2 Campb. 317. Ellenborough, C. J. 1810.

119. And *semble*, that the defendant would not have been liable, though the assignment had been complete. *Ibid.* and 13 East, 238, S. C.

Sed vide *Parish* v. *Crawford*, 2 Stra. 1251; Abbott, L. S. 22, 3, 4, 5.

120. A mortgagee never in possession, or known to the plaintiff, is not liable for stores supplied by the captain's order. *Twentyman* v. *Hart*, 1 Stark. 366. Ellenborough, C. J. 1816.

121. The ship-owners are liable for stores supplied by order of their supercargo after abandonment on caption, where the vessel is afterwards liberated on bail. *Mitchell* v. *Glennie*, 1 Stark. 230. Ellenborough, C. J. 1816.

122. And where the vessel is seized in consequence of the illegal acts of the supercargo, but the owners recover possession in the court of Admiralty, they adopt his acts, and are liable, up to the seizure. *Ibid.*

123. And the court refused a rule nisi for a new trial, on the ground that the relation of master and owner did not subsist between the captain and the defendant, *and that the case of a ship hired for a definite period, differs from that of a vessel chartered for a particular voyage, where the master is always appointed by the owner.* *Ibid.* and 13 East, 238, S. C. rather differently reported.

124. Where the ship was chartered for a particular voyage only, and was put up by the freighter as a general ship, the registered owners were held not to be liable for a tortious conversion of the plaintiff's goods by the captain, unless it could b shewn that they were received on board by some person appointed by them. *Mackenzie* v. *Rowe and others*, 2 Campb. 482. Ellenborough, C. J. 1810.

Contra, *Parish* v. *Crawford*, 2 Stra. 1251; more fully reported, Abbott, L. S. 22.

125. A master employed by mortgagor in possession cannot sue the mortgagee. *Annett* v. *Carstairs and another*, 3 Camp. 354. Ellenborough, C. J. 1813.

And see *Young* v. *Brander*, 8 East, 10; *Trewhella* v. *Rowe*, 11 East, 435; *M'Iver* v. *Humble*, 16 East, 169.

G. (c) *Liability of owner for misfeasance.*

126. *Semble*, that the owner of a barge is not responsible for an injury occasioned by the negligence of a person to whom he has lent her. *Scott* v. *Scott and others*, 2 Stark. 438. Best, J. 1818.

H. Liability of master.

(And see ante, G. (a).)

127. The captain is not responsible for a loss occasioned by the negligence of the pilot. *Aldrich* v. *Simmons*, 1 Stark. 210. Gibbs, C. J. 1816.

128. An action lies against the master of a vessel for purposely firing at the natives on a foreign coast, and thereby preventing them from trading with the plaintiff. *Tarleton and others* v. *M'Gawley*, Peake, 205. Kenyon, C. J. 1793.

129. Although it appear that the defendant had not conformed to the laws of that country, by paying a duty imposed upon licences to trade. *Ibid.*

130. By the custom of the river Thames, masters are bound to guard goods and watch goods in lighters sent by the *consignees*, until the loading is complete. A master tells a lighterman that he has not hands enough to take charge of the goods; the lighterman returns no answer; the master remains liable. *Catley and another* v. *Wintringham*, Peake, 150. Kenyon, C. J. 1792.

131. But where it is proved to be the custom of wharfingers when goods are sent to be forwarded coastwise, to deliver them to the mates of the coasters, and not to ship the goods themselves, or make any charge for shipping, the responsibility of the wharfinger ceases with the delivery to the mate, though the goods are lost before they are carried off the wharf. *Cobban and another* v. *Downe*, 5 Esp. 41. Ellenborough, C. J. 1803.

And see *Sparrow* v. *Carruthers*, 2 Stra. 1236; *Hurry* v. *Royal Exchange Assurance Company*, 2 Bos. & Bul. 430; *Strong* v. *Natally*, 1 N. R. 16; *Robinson* v. *Turpin*, Abbott, L. S. 261.

I. Authority of master.

132. *Semble*, that the captain of an Indiaman may imprison a passenger who refuses to take the post assigned to him on the approach of an enemy. *Boyce* v. *Bayliffe*, 1 Campb. 60. Ellenborough, C. J. 1807.

K. Seamen's wages.

133. No action lies upon an express promise to pay a seaman extra wages, in consideration that he will exert himself in an extraordinary manner for the preservation of the ship. *Harris* v. *Watson*, Peake, 72. Kenyon, C. J. 1791.

(And see ante, Sheriff, pl. 4.)

134. Nor when the contract is made on shore, and the extra work is occasioned by the desertion of part of the crew. *Stilk* v. *Meyrick*, 6 Esp. 129, and 2 Campb. 317. Ellenborough, C. J. 1809.

135. It might perhaps be otherwise if the remainder of the crew were discharged by the captain. *Ibid.*

And see *Dacosta* v. *Newnham*, 2 T. R. 407, 10, 3.

136. Where, by a ship's articles, no wages are to be paid until the vessel reaches her ultimate port of destination, and the master wrongfully dismisses a seaman, the wages are payable immediately. *Sigard* v. *Roberts*, 3 Esp. 71, 3. Eldon, C. J. 1799.

And see Abbott, L. S. 451.

137. Where a ship is recaptured and reaches her port of destination, the seamen are entitled to wages. *Bergstrom* v. *Mills*, 3 Esp. 37. Eldon, C. J. 1799.

Sed vide *Chandler* v. *Meade*, cited 2 Lord Raym. 1211; *Curling* v. *Long*, 1 Bos. & Pul. 634, 7.

And see *Pratt* v. *Cuff*, 2 Law Journal, 415, cited in *Thompson* v. *Rowcroft*, 4 East, 43; *Beale* v. *Thompson*,

4 East, 546, 53; S. C. 1 Smith, 144, 144, 50; *Johnson* v. *Broderick*, 4 East, 566; S. C. 1 Smith, 144, 53; Molloy, lib. 2. c. 4. sect. 13, 14; The Friends, Bell, 4 Rob. A. R. 143.

138. A seaman is entitled to wages during a hostile embargo, while he was imprisoned on shore, if the crew were afterwards restored, and the ship completed the voyage and earned freight without shewing the nature of the embargo. *Delamainer* v. *Winteringham*, 4 Campb. 186. Ellenborough, C. J. 1815.

N. It lies upon the defendant to prove that no freight was earned. *Brown* v. *Millner*, 7 Taunt. 319, 1 Moore, 65. S. C.

139. *Semble*, that a foreign seaman serving in a British ship, who, upon the capture of the ship, enters into the enemy's service, forfeits all claim to wages, whatever may be the ultimate fate of the ship. *Bergstrom* v. *Mills*, *ubi supra*.

140. A licence from the chief magistrate of a port in the West Indies, authorizing the master of a vessel to engage seamen at more than double the usual rate, must specify the wages to be given. *Rodgers* v. *Lacy*, 3 Esp. 43. Eldon, C. J. 1799.

And the court of C. P. refused a rule to set aside a nonsuit directed on the ground of the nullity of a licence to the master to engage seamen *on the best terms he could*. *Ibid.* and 2 Bos. & Pul. 57.

141. A seaman sent on shore on duty, requests to be permitted to stay there to get some food, having had none in the course of the day. Permission is refused, and he remains there till the next morning, when he returns to the ship, but is not received. This is no desertion. *Sigard* v. *Roberts*, *ubi supra*.

142. Nor if he leave the ship on account of inhuman treatment. *Linland* v. *Stephens*, 3 Esp. 269. Kenyon, C. J. 1801.

143. If foreign seamen enter into a written agreement with the master, a collateral parol agreement, made in contravention of the laws of their own country, cannot be enforced. *Hulle* v. *Heightman*, 4 Esp. 75. Le Blanc, J. 1801.

S. C. Abbott, L. S. 463.

144. Where mariners enter into a specific contract, by which no wages are to be received until their return, and they are prevented by the master from completing the voyage, they cannot recover the wages in *indebitatus assumpsit*, but must declare specially. *Ibid.*

And the court of K. B. refused a rule to set aside nonsuit. 2 East, 145.

145. Where the master and mariners are to receive a proportion of the produce of the voyage in lieu of wages, the latter may sue the former as soon as the account is liquidated. *Wilkinson* v. *Frasier*, 4 Esp. 183. Alvanley, C. J. 1802.

And see *Morse* v. *Wilson*, 4 T. R. 353; *Waugh* v. *Carver*, 2 H. Bl. 235; *Hesketh* v. *Blanchard*, 4 East, 144; WITNESS, C. (h).

146. Mariners contract with the captain of a whaler for a share of the net proceeds, provided they serve faithfully. Money had and received will not lie against the owner, who disposes of the cargo for the benefit of all concerned, unless defendant has admitted the faithful service; the declaration should be special. *Evans* v. *Bennett*, 1 Campb. 300. Ellenborough, C. J. 1808.

147. The rule that wages are not payable unless freight be earned, holds where the voyage is abandoned on account of unseaworthiness. *Eaken* v. *Thom*, 5 Esp. 6. Ellenborough, C. J. 1803.

148. But *semble*, that in such case the owner would be liable to a special action at the suit of a seaman who had thereby lost his wages. *Ibid.*

149. And if, after the voyage has been abandoned, a seaman be desired to remain on board for a specific purpose, he may recover for work and labour. *Ibid.*

150. A mariner, who is also a sailmaker, cannot, in the latter capacity, claim a sum beyond the wages mentioned *in the articles*, as gratuity wages, though such a claim be supported by usage, and by an express promise on the part of the owner. *Elsworth*, *executor*, v. *Woolmore and another*, 5 Esp. 84. Alvanley, C. J. 1803.

S. C. Abbott, L. S. 448.

Acc. *White* v. *Wilson*, 2 Bos. & Pul. 116; 2 Rob. A. R. 241.

151. By the ship's articles no seaman was to be entitled to demand his wages until twenty days after arrival. Held, that before the expiration of that period he may sue for wages which the defendant has admitted to be due and offered to pay. *White* v. *Mattison*, 2 Stark. 325. Ellenborough, C. J. 1818.

Sed vide ante, ASSUMPSIT, pl. 1.

152. Though by 2 Geo. II. cap. 36. sect. 13. it is provided, that no seaman or mariner belonging to any merchant vessel shall, for entering into the service of his majesty, on board any of his ships, forfeit the wages due to him during the time of his service in such vessel, and that such entry shall not be deemed a desertion, yet where a seaman is impressed from the merchant service in the course of a voyage, he holds his claim to wages *pro tanto*, subject to being devested by the non-arrival of the vessel. *Dunkley* v. *Bulwer and Lloyd*, 6 Esp. 86, 2 Campb. 320, n. Anon. but S. C. Ellenborough, C. J. 1806.

And see *Wiggins* v. *Ingleton*, 2 *Lord Raymond*, 1211.

153. In an action for wages, the plaintiff may, under this statute, go into evidence of the articles, without giving notice to produce them. *Bowman* v. *Manzelman*, 2 Campb. 315. Ellenborough, C. J. 1809.

154. The statute does not apply to the case of a British seaman entering on board a foreign vessel in a British port. *Dickman* v. *Benson*, 3 Campb. 290. Ellenborough, C. J. 1812.

155. Where a seaman has forfeited his wages, and the captain afterwards employs him without reserving to himself a right to insist on the forfeiture, the forfeiture is waved. *Miller* v. *Brant*, 2 Campb. 590. Ellenborough, C. J. 1811.

156. A seaman at Gottenburg enters into articles of agreement with the master of a foreign vessel for a voyage to England, whereby he undertakes not to sue the captain for wages till their return to G. Held, that no action can be maintained here for the wages in contravention of their stipulation. *Johnson* v. *Machielsne*, 3 Campb. 44. Ellenborough, C. J. 1811.

S. P. *Gienar* v. *Meyer*, 2 H. Bla. 603.

And see ante, pl. 43, 4.

157. After a vessel has been wrecked, the captain gives a mariner an order upon the owner for the amount of his wages. To this order is subjoined an acknowledgment, that the mariner had served 15 months upon a monthly hiring by himself. As from the loss of the vessel no *primâ facie* right to wages appeared, it was held, that no action could be maintained against the captain, without proving a demand on the owner, the drawee. *Forsboom* v. *Kruger*, 3 Campb. 197. Ellenborough, C. J. 1812.

L. GENERAL AVERAGE.

158. *Semble*, that assumpsit for general average lies for one shipper against another. *Dobson and others* v. *Wilson*, 3 Campb. 480. Ellenborough, C. J. 1813.

159. But no contribution can be demanded for the value of goods which the captain sells to redeem himself from imprisonment. *Ibid.*

And see *Covington* v. *Roberts*, 2 N. R. 378.

M. SHIP-BUILDER.

(And see ante, EVIDENCE, pl. 210; INSURANCE, pl. 224, 225.)

M. (a) *Liability of, for negligence.*

160. The proprietor of a dry dock into which a vessel is put for repair, is answerable for an injury arising in the day-time from the bursting in of the dock-gates, though the gates were strong enough to have resisted the ordinary pressure of the water; if the accident might have been prevented, had a sufficient number of men been on the spot. *Leek and another* v. *Maestaer*, 1 Campb. 138. Ellenborough, C. J. 1807.

And see 1 Stra. 128; Bull. N. P. 69.

SMUGGLING.

(And see ante, BILLS AND NOTES, pl. 100; EVIDENCE, pl. 10, 340; INSURANCE, pl. 190; SHIP, pl. 51, 76, 129.

1. Upon an information for obstructing custom-house officers in the execution of their duty, the defendant will not be permitted to inquire the name of the informer, or to go into the question, whether the goods were smuggled or not. *Rex* v. *Akers*, 6 Esp. 125. Kenyon, C. J. 1790.

2. A *foreigner* selling goods abroad, and packing them by the directions of the vendor, in a particular manner, for the purpose of facilitating the smuggling of the articles into this country, cannot recover the price. *Bernard et alt.* v. *Reed*, 1 Esp. 91. Kenyon, C. J. 1794.

S. P. *Waymell* v. *Reed*, 5 T. R. 599. And see *Holman* v. *Johnson*, Cowp. 344; *Biggs* v. *Lawrence*, 3 T. R. 454; *Clugas* v. *Penaluna*, 4 T. R. 466.

3. But in an action for not accounting for goods delivered to the master of a ship to be sold by him abroad, it is no defence that they were exported without paying duties. *Catlin, spinster*, v. *Bell*, 4 Campb. 183. Ellenborough, C. J. 1815.

4. Unless the evasion formed part of the contract. *Ibid.*

5. If the exportation of a particular sort of goods, without the king's licence, be prohibited, a licence will be presumed upon proof of such goods having been regularly entered outwards at the custom-house. *Van Omeron* v. *Dowick and others*, 2 Campb. 44. Ellenborough, C. J. 1809.

And see *Attorney General* v. *Sheriff*, Forrest, 43; ante, EVIDENCE, pl. 340.

STAMPS.

A. DEEDS.

B. AGREEMENTS.

C. RECEIPTS.

D. BILLS AND NOTES.

E. OTHER INSTRUMENTS.

A. DEEDS.

1. A fraudulent conveyance cannot be read to prove an act of bankruptcy, unless it be stamped. *Whitwell and others, assignees, &c.* v. *Dimsdale and others*, Peake, 168. Kenyon, C. J. 1792.

2. A deed not bearing the stamp appropriated to the instrument, cannot be received in evidence, though it bear a stamp of equal value. *Robinson* v. *Drybrough*, 1 Esp. 243. Kenyon, C. J. 1794.

And the court of K. B. set aside a nominal verdict taken for the plaintiff. *Ibid.* and 6 T. R.

N. But by 37 Geo. III. cap. 136. s. 1. such a deed might have been restamped upon payment of a penalty of 5*l.*; and now, by 43 Geo. III. cap. 127. s. 5. it may be restamped without a a penalty.

And by sect. 6. a stamp of greater value, if belonging to the same denomination, is valid.

And see *Doe* v. *Whittingham*, 4 Taunt. 20.

3. A count for necessaries furnished for the defendant's *apprentice*, cannot be supported, if it appear that there was no stamped indenture. *Aldridge, pauper*, v. *Ewen*, 3 Esp. 188. Kenyon, C. J. 1800.

N. The stamp duty is to be paid by the master, not by the parent. *Keele* v. ——, K. B. T. T. 1819.

4. An indorsement upon a conveyance in trust, limiting the powers of the trustee, need not be stamped. *Herne et alt.* v. *Hale*, 3 Esp. 237. Kenyon, C. J. 1800.

5. A bond conditioned for the safe custody and production of a box, containing the subscriptions of a benefit club, is within the exemption in 33 Geo. III. cap. 54. s. 4. *Carter* v. *Bond*, 4 Esp. 253. Ellenborough, C. J. 1803.

6. A bond conditioned for not converting a house to a particular purpose does not requi . *ad valorem* stamp. *Hughes* v. *King*, 1 Stark. 118. Ellenborough, C. J. 1815.

7. Or a covenan to pay an annuity as a consideration for relinquishing a business and the use of premises. *Lyburn* v. *Warrington*, 1 Stark. 162. Ellenborough, C. J. 1816.

8. An acknowledgment, whereby the obligor admits that he has broken the condition, and promises to pay a certain sum in satisfaction, is evidence of the breach without a stamp. *Ibid.*

See ante, Bills and notes, A. (a)

B. Agreement.

9. A written wager, doubled by an indorsement, requires two stamps. *Robson* v. *Hall*, Peake, 127. Kenyon, C. J. 1792.

10. But if there be one stamp only, the instrument is evidence of the *first* wager. *Ibid.*

And see *Henfree* v. *Bromley*, 6 East, 309; S. C. 2 Smith, 400; *French* v. *Patton*, 9 East, 351.

11. Where a schoolmaster seeks to recover beyond the actual period of schooling, on the ground of removal without notice, according to the terms of a prospectus delivered to the defendant, the identical copy of the prospectus delivered to the defendant must be produced stamped. *Williams* v. *Stoughton*, 2 Stark. 292. Ellenborough, C. J. 1817.

12. In an action by a broker for commission, a prospectus of plaintiff's terms of doing business, though acted upon, is not evidence of the agreement itself, but is *functus officio* before the parol contract is entered into, and requires no stamp. *Edgar* v. *Blick*, 1 Stark. 464. Ellenborough, 1816.

13. An agreement made, and bearing date, *at sea*, may be given in evidence without a stamp. *Ximenes* v. *Jaques*, 1 Esp. 311. Kenyon, C. J. 1795.

S. C. not S. P. 6 T. R. 499.

14. Where a contract is signed by one party, and, *previously to the accession of the other party*, a new stipulation is inserted, the agreement is single and entire, and requires but one stamp. *Knight* v. *Crockford*, 1 Esp. 189. Eyre, C. J. 1794.

15. The instructions for advertising a dissolution of partnership in the gazette, cannot be read to prove the fact of the dissolution without an agreement stamp. *May* v. *Smith*, 1 Esp. 283. Kenyon, C. J. 1795.

16. But it has been since held that the notice of dissolution may be read without a stamp. *Jenkins and another* v. *Blizard and another*, 1 Stark. 417. Ellenborough, C. J. 1816.

17. A contract of marriage requires no stamp. *Orford* v. *Cole*, 2 Stark. 351. Bayley, J. Lancaster, 1818.

And the justices at Lancaster (Richards, C. B. and Bayley, J.) discharged a rule for a new trial. *Ibid.*

18. An agreement made between merchants residing within 50 miles of each other, for the share of the outfit of a ship and of the adventure, requires a stamp. *Leigh et alt.* v. *Banner*, 1 Esp. 403. Kenyon, C. J. 1795.

19. An instrument produced by the adverse party under a notice, cannot be given in evidence as an agreement between such party and a stranger, unless it be stamped. *Doe* d. *St. John* v. *Hore*, 2 Esp. 724. Kenyon, C. J. 1799.

20. Where the parties signed an unstamped agreement, and the plaintiff, before action brought, tendered to the defendant an engrossment of the agreement properly stamped, which the latter refused to execute, the master was directed to include the stamping of the original agreement in the costs of the action. *Bowen* v. *Pitman, gent.* 2 Esp. 728. Kenyon, C. J. 1799.

21. Where premises are held under an unstamped agreement, the landlord cannot enter into parol evidence of the demise. *Brewer* v. *Palmer*, 3 Esp. 213. Eldon, C. J. 1800.

Acc. *Rex* v. *Inhabitants of St. Paul's, Bedford*, 6 T. R. 452.

Sed vide *Alves* v. *Hodson*, 7 T. R. 241.

And see *White* v. *Wilson*; 2 Bos. & Pul. 118; *Hodges* v. *Drakeford*, 1 N. R. 272, 3.

22. Where a verbal contract for the sale of goods is afterwards put into writing by the vendor's agent for the purpose of assisting his recollection, but the memorandum is not signed by the vendee, it need not be produced. *Dalison* v. *Stark*, 4 Esp. 163. Ellenborough, C. J. 1802.

23. If a paper be produced with a

single stamp, and it appear to have contained originally *two* distinct agreements, one of which is erased, the stamp is *primâ facie* sufficient; and it lies upon the opposite party to shew that both agreements were on the paper at the time the stamp was affixed. *Waddington* v. *Francis*, 5 Esp. 182. Ellenborough, C. J. 1804.

24. An unstamped agreement is valid as far as it relates to the sale of goods, though it contain stipulations unconnected with the contract of sale. *Heron* v. *Granger*, 5 Esp. 269. Ellenborough, C. J. 1805.

Vide tamen *Norton* v. *Simmes*, Moor, 856, 4th resolution; S. C. Hob. 14; *Lexington* v. *Clarke*, 2 Vent. 223; *Chaters* v. *Beckett*, 7 T. R. 201; *Ames* v. *Hill*, 2 Bos. & Pul. 150; post. C. pl. 38, 39, 40.

25. Assumpsit for the price of a gun, upon contract to receive another and 15 guineas to boot. The other gun had been delivered, but afterwards borrowed by defendant. Held, that a letter from the defendant might be read to prove the borrowing without a stamp, but not to prove the contract. *Forsyth and others* v. *Jervis*, 1 Stark. 437. Ellenborough, C. J. 1816.

26. But a stipulation for rescinding a former agreement for the sale of goods, is itself within the exemption. *Whitworth* v. *Crockett and another*, 2 Stark. 431. Abbott, C. J. 1818.

27. "I promise to pay A. B. 65l. and also all other sums which may be due to him" requires an agreement stamp. *Smith and wife, administrators of Eastling*, v. *Nightingale*, 2 Stark. 375. Ellenborough, C. J. 1818.

28. An undertaking to guarantee the payment of goods *to be furnished* to third persons, falls within the exception contained in 44 Geo. III. cap. 98. schedule A. p. 200, in favour of any memorandum, letter, or agreement, made for, or *relating to*, the sale of any goods, wares, or merchandizes. *Warrington et alt* v. *Furber and Warrington*, 6 Esp. 89. Ellenborough, C. J. 1806.

And the court discharged a rule for a new trial. 8 East, 242.

S. P. *Watkins* v. *Vince*, 2 Stark. 368. Ellenborough, C. J. 1818.

N. 48 Geo. III. cap. 149. schedule, part 1. page 600, 55 Geo. III. cap. 184, schedule, part 1, contain the same exemption. See, in *Curry* v. *Edensor*, 3 T. R. 524, a similar decision on the exemption in 23 Geo. III. cap. 58, respecting the guarantee of a *present* sale. But see *Waddington* v. *Bristow*, 2 Bos. & Pul. 452; *Buxton* v. *Bedall*, 3 East, 303; *Venning* v. *Leckie*, 13 East, 7.

29. Two parts of an agreement were each signed by plaintiff and defendant. One part stamped was in the possession of the latter, who had notice to produce. The unstamped part was received as secondary evidence of the agreement. *Waller* v. *Horsfall*, 1 Campb. 501. Ellenborough, C. J. 1808.

And see *Garnons* v. *Swift*, 1 Taunt. 507, 8, n.

30. In an action for not delivering goods manufactured by the defendant, in pursuance of an order from the plaintiff, a memorandum signed by the plaintiff only, describing the nature and quantity of the goods, but not specifying the price, may be given in evidence without a stamp; and the acceptance of the order by the defendant, and the precise terms of the contract, may be proved by other evidence. *Ingram* v. *Lea*, 2 Campb. 521. Ellenborough, C. J. 1810.

31. An agreement made in a foreign country, cannot be received in evidence here, if it appear, that by the laws of that country, the instrument would not be available there for want of a stamp. *Clegg* v. *Levy*, 3 Campb. 166. Ellenborough, C. J. 1812.

S. P. *Alves* v. *Hodgson*, 7 T. R. 241.

And see *Snaith* v. *Mingay*, 1 M. & S. 87, 90.

32. But until the law of the country is distinctly proved, it will be presumed that no stamp is necessary. *Clegg* v. *Levy, ubi supra.*

C. Receipts.

33. A bill of parcels subscribed "settled by two bills, one at nine, and the other at twelve, months," requires a receipt stamp. *Smith* v. *Kelly*, Peake, 25 n. Ellenborough, C. J. 1803.

34. Or an *agreement* stamp. S. C. as reported, 4 Esp. 249.

35. An acknowledgment of having received acceptances, accompanied with

an undertaking to provide for them, requires a *receipt* stamp. *Scholey* v. *Walsby*, Peake, 24. Kenyon, C. J. 1790.

N. *Qu.* Or a *note*, or *agreement* stamp? Vide ante, BILLS AND NOTES, pl. 1.

36. If a tradesman write "settled," under his bill, and put his initials, he incurs the penalty for giving a receipt without a stamp. *Spawforth, qui tam*, v. *Alexander*, 2 Esp. 621. Kenyon, C. J. 1798.

37. *Semble*, that an unstamped receipt may be used by a witness who saw the money paid and the receipt given, to refresh his memory. *Rambert* v. *Cohen*, 4 Esp. 213. Ellenborough, C. J. 1802.

38. A receipt given on a receipt stamp, is not invalidated by the addition of matter which requires an agreement stamp, where the words added do not control or qualify the terms of the receipt. *Grey* v. *Smith and another, sheriff of Middlesex*, 1 Campb. 388. Ellenborough, C. J. 1808.

And see ante, B. 24; *Corder* v. *Drakeford*, 3 Taunt. 382.

39. A stamped receipt for the price of a horse "warranted sound," is evidence of the warranty, without an agreement stamp. *Skrine* v. *Elmore*, 2 Campb. 407. Ellenborough, C. J. 1810.

40. S. P. said to have been ruled in *Brown* v. *Frye, ibid.* Lawrence, J. Devon, 1809.

And see 2 Atk. 135.

41. A receipt for money paid to deputy receivers general requires no stamp, though it be signed by their clerk. *Edden* v. *Read*, 3 Campb. 338. Ellenborough, C. J. 1813.

42. Where the indorsements on a bond have left no space for receipts upon subsequent payments, such receipts written on plain paper, annexed to the bond may be read in evidence. *Orme* v. *Young*, 4 Campb. 336. Gibbs, C. J. 1815.

D. BILLS AND NOTES.

(And see ante, BILLS AND NOTES, A. (c))

43. If a promissory note be produced with a proper stamp, the defendant cannot shew that the note was not stamped when made, though the commissioners have exceeded their authority in affixing the stamp. *Wright and others* v. *Riley*, Peake, 173. Kenyon, C. J. 1793.

And see *Rex* v. *Episcopum Cestriensem*, 1 Stra. 624; S. C. 8 Mod. 364, more fully; see vide post, F. 66; *Snaith* v. *Mingay*, 1 M. and S. 87.

44. Where a creditor is paid in an unstamped draft, he may sue for his original demand, though he have neglected to present the draft for payment. *Ruff* v. *Webb*, 1 Esp. 129. Kenyon, C. J. 1794.

45. Where a note is void for want of a stamp, the plaintiff may go into evidence of the consideration. *Wilson* v. *Kennedy*, 1 Esp. 245. Kenyon, C. J. 1714.

S. P. *Tyte* v. *Jones*, 1 East, 58, n.

And see *Puckford* v. *Maxwell*, 6 T. R. 52; *Alves* v. *Hodgson*, 7 T. R. 241; *White* v. *Wilson*, 2 Bos. & Pul. 118.

46. But where such a draft is given in payment of a demand, upon which the credit does not expire till the day appointed for the payment of the bill, the creditor cannot sue before the day. *Swears* v. *Wells*, 1 Esp. 317. Kenyon, C. J. 1795.

47. Held, that a promissory note upon a *receipt* stamp, imposed by the same statute which imposed the duty on notes, is valid. *Aitcheson* v. *Sharland*, 1 Esp. 292. Kenyon, C. J. 1795.

Cont. *Manning* v. *Livie*, Bayl. 37; *Chamberlain* v. *Porter*, 1 N. R. 30.

N. 37 Geo. III. cap. 136. s. 1. and 43 Geo. III. cap. 127. s. 5. do not extend to bills, notes, or cheques. But see 43 Geo. III. cap. 127. s. 6.

48. In an action by indorsee against indorser, where the bill was originally made payable to the defendant only, without the words "or to his order," which were added by the drawer subsequently to the indorsement, it was held, that the bill was not invalidated by the alteration. *Kershaw et alt.* v. *Cox*, 3 Esp. 246. Le Blanc, J. 1800, and K. B. H. 1801.

And see *Cole* v. *Parkin*, 12 East, 471, 5; *Bathe* v. *Taylor*, 15 East, 412.

49. So a promissory note, before it is negotiated, may be converted into a bill

of exchange in furtherance of the original intention of the parties. *Webber* v. *Robert Maddocks*, 3 Campb. 1. Ellenborough, C. J. 1811.

50. A bill altered from three to four months, before acceptance, with the consent of the drawer, does not require a new stamp. *Kennerly* v. *Nash*, 1 Stark. 452. Ellenborough, C. J. 1816.

51. A cheque on a banker postdated, and delivered before the day on which it bears date, though not intended to be used before that day, required a stamp under 31 Geo. III. cap. 25. s. 4. *Allen* v. *Keeves*, 3 Esp. 281. Kenyon, C. J. 1801.

And the court set aside a verdict for the plaintiff. *Ibid.* and 1 East, 435.

52. In an action for bribery against a candidate at an election, an unstamped paper, purporting to be a promissory note, given by the voter as a cloak for the bribe, is evidence to shew the fact of the payment of the sum mentioned in the note. *Dover* v. *Maestaer*, 5 Esp. 93. Ellenborough, C. J. 1803.

And see infra, pl. 55.

53. Where a promissory note is given without a stamp, and the maker writes upon it a memorandum of his having paid a certain sum for interest, such memorandum may be read as an admission that there was due a principal sum which would yield so much interest. *Manley et ux.* v. *Peel*, 5 Esp. 121. Ellenborough, C. J. 1804.

54. If the plaintiff, in his particular, demand money due on a promissory note only, which note appears to be on an improper stamp, he cannot resort to the money counts. *Wade* v. *Beasley*, 4 Esp. 7. Kenyon, C. J. 1801.

But see *Brown* v. *Hodgson*, 4 Taunt. 189. And see ante, Bills, A. (b).

E. Other instruments.

(And see post, Trover, A. 12.)

55. To prove the effecting of a lottery insurance, the illegal policy may be read without a stamp. *Holland, qui tam,* v. *Duffin*, Peake, 58. Kenyon, C. J. 1791.

56. An instrument containing an acknowledgment of having received an acceptance and an undertaking to provide for it, was held to require a receipt stamp. *Scholey* v. *Walsby*, Peake, 24. Kenyon, C. J. 1790.

Sed vide ante, Bills and Notes, A. (a) 1, 2, 3, 5.

57. A newspaper may be read in evidence without a stamp. *The King* v. *Pearce*, Peake, 75. Kenyon, C. J. 1791.

58. *Semble*, that the bailiff's indorsement on a warrant upon a *fi. fa.* acknowledging the receipt of the levy money, requires no stamp. *Perchard and Hamerton, sheriffs of London,* v. *Tindall*, 1 Esp. 394. Kenyon, C. J. 1795.

59. An I. O. U. is evidence of the acknowledgment of a debt without being stamped. *Fisher, gent.* v. *Leslie*, 1 Esp. 426. Eyre, C. J. 1795.

And see ante, pl. 53.

60. S. P. ruled on the authority of the last case, in *Israel* v. *Israel*, 1 Campb. 499. Ellenborough, C. J. 1808.

61. S. P. contra, *Guy* v. *Harris*, Chitty on Bills, 428, n. Eldon, C. J. 1800.

62. No action can be maintained on an instrument, which by the laws of the country in which it was made, is void for want of a stamp. *Alves* v. *Hodgson*, 2 Esp. 528. Kenyon, C. J. 1797.

And the court concurred with the C. J. *Ibid.* and 7 T. R. 241.

63. The articles of a Swedish ship made in Sweden, and deposited by the captain on his arrival here with the Swedish consul, were admitted to prove a fact relative to the engagement of a seaman, who had been hired after the arrival of the vessel in this country. *Winbled* v. *Malmberg*, 2 Esp. 454. Eyre, C. J. 1796. Ante, Ship, pl. 156.

64. A *building* lease under 5l. per annum, is not exempted from the stamp duty. *Doe* d. *Hunter et alt.* v. *Boulcot et alt.* 2 Esp. 595. Eyre, C. J. 1797.

65. A *postea* cannot be given in evidence in another cause without a stamp. *Rex* v. *Hammond Page*, 2 Esp. 650, n. and 6 Esp. 83. Kenyon, C. J. 1788.

66. A policy of insurance effected without a stamp, is an absolute nullity by the express words of 35 Geo. III. cap. 63. s. 14 and 16; and cannot be rendered valid by a stamp subsequently affixed by the commissioners upon the payment of the duty and penalty. *Ro-*

derick v. *Hovil*, 3 Campb. 103. Ellenborough, C. J. 1811.

Sed vide ante, D. pl. 41. And see ante, INSURANCE, pl. 263.

STATUTES.

A. HOW CONSTRUED.

B. POINTS ON PARTICULAR STATUTES.

(a) 31 *Eliz. cap.* 12. *sect.* 4. (*Stolen horses.*)

(b) 12 *Car. II. cap.* 18. (*Navigat'n Act.*)

(c) 31 *Car. II. cap.* 2. (*Habeas corpus.*)

(d) 1 *Will. & Mar. cap.* 18. (*Toleration.*)

(e) 7 & 8 *Will. III. cap.* 4. (*Treating.*)

(f) 9 & 10 *Will. III. cap.* 41. (*Naval stores.*)

(g) 8 *Ann. cap.* 9. (*Apprentices.*)

(h) 1 *Geo. I. stat.* 2. *cap.* 5. (*Riot.*)

(i) 6 *Geo. I. cap.* 8. (*Joint stock companies.*)

(k) 10 *Geo. I. cap.* 10. (*Excise.*)

(l) 7 *Geo. II. cap.* 8. (*Stockjobbing.*)

(m) 17 *Geo. II. cap.* 40. (*Naval stores.*)

(n) 24 *Geo. II. cap.* 18. (*Special jury.*)

(o) 24 *Geo. II. cap.* 40. (*Retailing spirits.*)

(p) 24 *Geo. II. cap.* 44. (*Protection of justices, &c.*)

(q) 14 *Geo. III. cap.* 78. (*Building act.*)

(r) 24 *Geo. III. cap.* 48. (*Excise.*)

(s) 26 *Geo. III. cap.* 60. (*Registers.*)

(t) 26 *Geo. III. cap.* 50; 28 *cap.* 20; 29. *cap.* 53. (*Whale fishery.*)

(u) 33 *Geo. III. cap.* 54. (*Friendly Societies.*)

(w) 34 *Geo. III. cap.* 9. (*Alien.*)

(x) 37 *Geo. III. cap.* 73. (*Seamen's wages.*)

(y) 39 *Geo. III. cap.* 58. (*Porterage.*)

(z) 39 & 40 *Geo. III.* (*Pawnbroker.*)

(aa) 43 *Geo. III. cap.* 58. (*New felonies.*)

(bb) 43 *Geo. III. cap.* 155, *s.* 13. (*Exemption from Navigation Act.*)

(cc) 43 *Geo. III. cap.* 184. (*Conveyancers.*)

(dd) 47 *Geo. III. sess.* 2. *cap.* 68. *sect.* 24. (*Coal ticket.*)

(ee) 49 *Geo. III. cap.* 123. (*Prize money*).

(ff) 52 *Geo. III. cap.* 39. *sect.* 30. (*General Pilot Act.*)

(gg) 52 *Geo. III. cap.* 130, *s.* 2. (*Demolishing Manufactories.*)

A. HOW CONSTRUED.

1. Justices of the peace are bound to use the forms of orders, &c. given by statute. *Goss* v. *Jackson*, 3 Esp. 198. Kenyon, C. J. 1800.

Acc. *Davison* v. *Gill*, 1 East, 64.

2. Where a statute prohibits the manufacturing of bricks under certain dimensions, a manufacturer cannot maintain an action for the price of bricks, all of which are under the standard size, although selected by the defendant and used by him. *Law* v. *Hodgson*, 2 Campb. 147. Ellenborough, C. J. 1808.

And the court refused a rule to set aside nonsuit. *Ibid.* and 11 East, 300.

3. And where a small portion only of a cargo consists of prohibited goods, an insurance on the cargo generally is void. *Parkin* v. *Dick*, 2 Campb. 221. Ellenborough, C. J. 1809.

4. A private act which directs that the expense of maintaining the assessing jury shall be borne in a particular manner, does not extend to a dinner provided for the jury *after they have delivered their verdict*. *Forster* v. *Taylor*, 3 Campb. 49. Ellenborough, C. J. 1811.

B. Points on particular statutes.

(And see Penal action.)

B. (a) 31 *Eliz. cap.* 12. *sect.* 4. *(Stolen horses.)*

5. To shew that a magistrate was authorized to cause a horse to be re-delivered to the owner, it must be proved that the horse was actually stolen. *Josephs* v. *Adkins*, 2 Stark. 76. Ellenborough, C. J. 1817.

6. An order to the officer entered in the magistrate's current book, cannot operate as a warrant. *Ibid.*

7. A warrant against the felon will not justify the taking of the horse out of the hands of the vendor. *Ibid.*

8. The original owner is a competent witness to prove the theft in an action by the vendor against the seizing officer. *Ibid.*

B. (b) 12 *Car. II. cap.* 18. *(Navigation Act.) Infra*, B. (bb).

9. A Holstein vessel, naturalized in Russia by being repaired there at an expense exceeding two-thirds of her whole value, is not a Russian vessel within the meaning of the Act. *Redhead and another* v. *Cator*, 1 Stark. 14. Ellenborough, C. J. 1815.

B. (c) 31 *Car. II. cap.* 2. *(Habeas corpus.)*

10. A person sent over from Ireland under a warrant from the secretary of state there, and committed under such warrant to the Poultry Compter, is entitled to a copy of the warrant within six hours after demand. *Sedley* v. *Arbouin, executor of West*, 3 Esp. 174. Eldon, C. J. 1800.

11. And the penalty incurred by refusing a copy, is not waved by a subsequent delivery and acceptance. *Ibid.*

N. As to the authority of a secretary of state to commit. Vide *Rex* v. *Kendal*, 1 Salk. 347; S. C. 1 *Lord Raym.* 65; *Rex.* v. *Wilkes*, 2 Wils. 151.

B. (d) 1 *Will. & Mar. cap.* 18. *(Toleration.)*

12. It is no defence to an indictment for disturbing a congregation of protestant dissenters, that the defendant committed the outrage for the purpose of asserting his right to the office of clerk. *Rex* v. *Hube and others*, Peake, 131. Kenyon, C. J. 1792.

13. On the trial of such an indictment, it need not be shewn that the minister has taken the oaths. *Ibid.*

14. The oaths being of record cannot be proved by parol. *Ibid.*

15. A congregation of foreign Lutherans, conducting the service of their chapel in the German language, are within the protection of this statute. *Ibid.*

16. The prosecutor may remove an indictment under this statute into B. R. by *certiorari*. *Ibid.*

S. C. and S. P. 5 T. R. 542.

B. (e) 7 & 8 *Will. III. cap.* 4. *(Treating.)*

17. It being contrary to the treating act for a candidate to furnish provisions for any voters after the teste of the writ, an innkeeper cannot maintain an action for provisions supplied even to non-resident voters. *Lofhouse, executor, &c.* v. *Wharton, esq. M. P.* 1 Campb. 550 n. Wood, B. Durham, 1808.

B. (f) 9 & 10 *Will. III. cap.* 41. *(Naval stores.)*

Vide infra, B. (n).

B. (g) 8 *Ann.* 9. *cap.* 9. *(Apprentices.)*

(And see ante, Stamps, pl. 3.)

18. Where it is agreed between the father of an apprentice and the master, that a premium of 20l. shall be paid, and the master afterwards, for the sake of reducing the stamp, agrees to take 19l. 19s. 6d. which is inserted in the indenture and paid, the indenture is not void by 8 Ann. cap. 9. s. 32. (or s. 35. and 39.) *Shepherd* v. *Hall*, 3 Campb. 180. Ellenborough, C. J. 1812.

B. (h) 1 *Geo. I. stat.* 2. *cap.* 5. *(Hundred. Riot.)*

(And see ante, Riot act.)

19. The hundred are liable for things

demolished or destroyed, but not for what is taken away. *Smith* v. *Bolton*, Holt, 201. Le Blanc, J. 1816, York.

And see 2 Wms. Saund. 377, a.

20. If the mob, after breaking the windows and doing other damage, retire spontaneously, without demolishing, the hundred are not liable. Anon. Holt, 203, n. Ellenborough, C. J. 1816.

21. But slight evidence is sufficient to raise the presumption of an intent to demolish; as where the rioters appear to have been checked by the proximity of troops. *Ibid.*

22. Breaking inside shutters, window sill, and wood of fan light, is a beginning to pull down, if the mob are interrupted before they have an opportunity of proceeding further. *Sampson* v. *Chambers and another*, 4 Campb. 221. Ellenborough, C. J. 1815.

23. *Secus*, where the mob voluntarily retire, "satiated with such an inception." *Lord King* v. *Chambers and another*, 4 Campb. 377. Ellenborough, C. J. 1816.

See the law and practice in actions on 1 Geo. I. stat. 2. cap. 5. in the notes to *Pinkney* v. *Inhabitants of Rutland*, 2 Wms. Saund. 374.

B. (i) 6 *Geo. I. cap.* 18. *(Joint stock companies.)*

24. If merchants raise a joint fund, and underwrite each other's property *severally*, the insurance is legal, though losses be paid out of the joint fund. *Harrison* v. *Millar*, 2 Esp. 513. Kenyon, C. J. 1796.

S. C. 7 T. R. 340, n.

25. It is an offence against 6 Geo. I. cap. 18. to act as secretary to an unincorporated joint stock company. No indictment will therefore lie for a conspiracy to deprive a person of such an appointment. *Rex* v. *Stratton and others*, 1 Campb. 549, n. Ellenborough, C. J. 1809.

B. (k) 10 *Geo. I. cap.* 10. *s.* 12. *(Excise.)*

26. An excise officer who obtains a search warrant under the act, may justify an entry, though no goods be found. *Cooper, et alt.* v. *Booth*, 3 Esp. 135. K. B. T. 1785.

27. And the magistrate or the commissioners who grant the warrant, are the sole judges of the reasonableness of the suspicion. *Ibid.*

B. (l) 7 *Geo. II. cap.* 8. *s.* 8. *and* 11. *(Stockjobbing.)*

28. An undertaking to replace stock lent is valid, though there be no stock standing in the name of the promisor at the time of the agreement. *Saunders* v. *Davison, et alt.* 2 Esp. 698. Kenyon, C. J. 1798.

S. P. *Sanders* v. *Kentish*, 8 T. R. 162.

29. *Omnium* is stock within the meaning of the statute. *Brown* v. *Turner*, 2 Esp. 631. Kenyon, C. J. 1798.

30. In another case it was said that the holder of omnium is *potentially* a possessor of stock. *Olivierson* v. *Coles*, 1 Stark. 496. Ellenborough, C. J. 1816.

31. An action, therefore, lies for not replacing stock for omnium. *Ibid.*

32. A bill for differences is void in the hands of an indorsee, with notice. *Steers* v. *Lashley*, 1 Esp. 166. Kenyon, C. J. 1794.

And the court discharged a rule for a new trial. *Ibid.* and 6 T. R. 61.

33. But a wager respecting the profits of a lottery contract is not within the act. *Mortimer* v. *Salkeld*, 4 Campb. 42. Ellenborough, C. J. 1814.

B. (m) 17 *Geo. II. cap.* 40. *s.* 10. *(Naval stores.)*

34. Where stores with the king's mark are found in the defendant's possession, it lies upon him to discharge himself, either by producing a navy board certificate, *or* shewing that the articles were purchased from a person who may be presumed to have a certificate. *Rex* v. *Banks*, 1 Esp, 144, 6. Kenyon, C. J. 1794.

35. If A. upon the suggestion of B. make a seizure of naval stores, and communicate the intelligence to the admiralty, B. is the party entitled to a moiety of the penalty under the statute. *Ibid.*

36. Held, that an informer entitled under this statue to a moiety of the

penalty for embezzling naval stores, is an incompetent witness for the prosecution, unless he will release his interest. *Rex* v. *Blackman*, 1 Esp. 95. Kenyon, C. J. 1794.

37. But in a subsequent case the informer was admitted, it being in the discretion of the court to fine or imprison. *Rex* v. *Cole*, Peake, 217, and 1 Esp. 169. Kenyon, C. J. 1794.

As to the discretionary power of punishing under these statutes, see *Rex* v. *Bland*, 5 T. R. 370.

B. (n) 24 *Geo. II. cap.* 18. *s.* 1. *(Special jury.)*

38. In criminal cases a judge cannot certify for the costs of a special jury. *The King, on the prosecution of Sermon,* v. *Lord Abingdon*, 1 Esp. 226. Kenyon, C. J. 1794.

B. (o) 24 *Geo. II. cap.* 40. *s.* 12. *(Retailing spirits.)*

39. *Semble*, that this statute merely prohibits the selling of small quantities of spirits to the *consumer*, and does not extend to liquors sold to a person who keeps an eating house, for the purpose of supplying his guests. *Jackson* v. *Attrill*, Peake, 180. Kenyon, C. J. 1793.

40. Upon the statement of an account arising out of cross demands, credit is given for the amount of spirits sold in quantities under the value of 20s. In an action for the balance these items cannot be disputed. *Dawson* v. *Remnant*, 6 Esp. 24. Mansfield, C. J. 1806.

41. Nor is it any defence to an action on a bill of exchange, that it was accepted by the defendant for the amount of small quantities of spirits sold to him by the plaintiff. *Spencer* v. *Smith*, 3 Campb. 10. Ellenborough, C. J. 1811.

Contra, *Scott* v. *Gilmore*, 3 Taunt. 226.

B. (p) 24 *Geo. II. cap.* 44. *s.* 8. *(Protection of justices, &c.)*

42. An officer acting *colore* officii, and not *virtute* officii, is not protected from actions brought after the expiration of six months. *Alcock* v. *Andrews*, 2 Esp. 542, n. Kenyon, C. J. 1788.

And see Anon. 1 Stra. 446; *Weller* v. Toke, 9 East, 364; *Clements* v. *Keen*, 2 Smith, 220.

43. Nor if he act without a warrant. *Postlethwaite* v. *Gibson and Slade*, 3 Esp. 226. Kenyon, C. J. 1800.

S. C. Selwyn, 824, n. 15.

And see *Money* v. *Leach*, 3 Burr. 1742.

44. A constable acting under a warrant from a magistrate, cannot be sued without a demand of a copy of the warrant, notwithstanding the illegality of the warrant, or the want of jurisdiction in the magistrate. *Price* v. *Messenger, et alt.* 3 Esp. 96. Eldon, C. J. 1800.

And the court coincided with the C. J. *Ibid.* 100, and 2 Bos. and Pul. 158.

45. Where the plaintiff declares generally, without charging the defendants *as officers*, he need not prove a demand of a copy of the warrant until the defendants have made it part of their case. *Ibid.*

Sed vide ante, PRACTICE. pl. 114.

B. (q) 14 *Geo. III. cap.* 78. *(Building act.)*

46. A verbal promise by the occupier to pay what is right and fair towards the rebuilding of a party wall, dispenses with the formalities of the statute, and with the necessity of shewing that he is the owner of the improved rent. *Stewart* v. *Smith*, Holt, 321. Gibbs, C. J. 1816.

And the court refused a rule for a new trial. 7 Taunt. 178.

B. (r) 24 *Geo. III. cap.* 48. *s.* 3. *(Excise.)*

47. Packages of starch exceeding 28 lbs. must be marked with the word *starch*, though ground down to the fineness of hair powder. *Aitcheson and another* v. *Madock, one, &c. another*, Peake, 162. Kenyon, C. J. 1792.

48. So where it is manufactured into sago powder. *Rex* v. *Stringer*. Skynner, C. B. Exch. cited *ibid.*

B. (s) 26 *Geo. III. cap.* 60. *(Registry.)*

49. Vessels employed in inland navigation only, are not within the act.

Laroche, bart. and others, v. *Wakeman and another*, Peake, 140. Kenyon, C. J. 1792.

B. (t) 26 *Geo. III. cap.* 50; 28 *Geo. III. cap.* 20; 29 *Geo. III. cap.* 53; *(Whale fishery.)*

50. Arrival at a place within the exchequer survey of a port, though no duties be in fact collected in such place, is a returning to a port in Great Britain, within the meaning of these acts. *Lacon, knight, et alt.* v. *Hooper, et alt.* 1 Esp. 246. Kenyon, C. J. 1794.

51. The months within which the voyage is to be performed must be taken to be *lunar* months. *Ibid.*

And see post, TIME.

52. An affidavit verifying the muster-roll, upon which it appears that the proper number of apprentices was on board when the vessel *cleared out*, is a sufficient proof of the fact of such apprentices being on board when the vessel sailed. *Ibid.*

N. These statutes are repealed, and other regulations made by 35 Geo. III. cap. 92.

B. (u) 33 *Geo. III. cap.* 54. *(Friendly societies.)*

53. The rules of a benefit friendly society are enrolled at the quarter sessions. Trustees appointed under new regulations not confirmed by the magistrates under s. 3. are not enabled to sue under s. 11. *Battey and another* v. *Townrow*, 4 Campb. 5. Ellenborough, C. J. 1814.

And see 35 Geo. III. cap. 111; 2 Saund. 47 f, g.

B. (w) 34 *Geo. III. cap.* 9. *s.* 1. *and* 7. *(Alien.)*

54. The alien bill furnishes no defence to an action brought by a person who comes here with an intention of returning to the enemy's country. *Michelotte* v. *Dillon*, 2 Esp. 622. Kenyon, C. J. 1798.

B. (x) 37 *Geo. III. cap.* 73. *s.* 3. *(Seamen's wages.)*

55. A licence from the chief magistrate of a port in the West Indies, authorizing the master of a vessel to engage seamen at more than double the usual rate, must specify the wages to be given. *Rodgers* v. *Lacy*, 3 Esp. 43. Eldon, C. J. 1799.

And the court of C. P. refused a rule to set aside a nonsuit. *Ibid.* and 2 Bos. & Pul. 57.

B. (y) 39 *Geo. III. cap.* 58. *(Porterage.)*

56. The statute 39 Geo. III. cap. 58. for the prevention of extortion in porterage. is cumulative, and does not affect the operation of stat. 30 Geo. II. cap. 24. for obtaining money by false pretences. 1 Campb. 215. Ellenborough, C. J. 1808.

B. (z) 39 & 40 *Geo. III. c.* 9. *s.* 5 & 15. *(Pawnbroker.)*

57. A. is entrusted by B. with cloth for sale, which A. pawns to C. After demand and refusal, B. may maintain trover against C. without tendering the duplicate. *Peet and another* v. *Baxter*, 1 Stark. 472. Ellenborough, C. J. 1816.

B. (aa) 43 *Geo. III. cap.* 58. *s.* 1. *(New felonies.)*
(And see ante, FELONY, D.)

58. The offence of "maliciously cutting with *intent* to resist lawful apprehension," is not committed where the party has no notice of the purpose of the officers. *Rex* v. *Ricketts*, 3 Campb. 68. Lawrence, J. Worcester, 1811.

And see ante, FELONY, pl. 14.

59. *Semble*, that the words "other grievous bodily harm," apply only to wounds in a vital part, inflicted under circumstances which, in case of death, would have amounted to murder. *Rex* v. *James Akenhead*, Holt, 469. Bayley, J. Northumberland, 1816.

B. (bb) 43 *Geo. III. cap.* 155, *s.* 13. *(Exception from Navigation act.)*

60. Cotton wool is not included in "all sorts of wool," when the words wool and cotton wool are used in another clause of the statute. *Pearce and*

others v. *Cowie*, 4 Campb. 363. Holt, 69. Gibbs, C. J. 1815.

B. (cc) 43 *Geo. III. cap.* 183. *(Certificated conveyancers.)*

61. The certificate qualifies only members of the inns of court. *Edgar* v. *Hunter*, Holt, 528.

62. But an agreement made by an unqualified person, binds the parties. *Ibid.*

See 3 Taunt. 235, 465; 14 East, 576.

B. (dd) 47 *Geo. III. sess.* 2. cap. 68. *s.* 24. *(Coal ticket.)*

63. The copy of the certificate delivered to the clerk of the market, describing the defendant as master of the vessel, is not evidence of a sending by him, without proof aliunde of his being master. *Alldred* v. *Halliwell*, 1 Stark. 117. Ellenborough, C. J. 1815.

And see ante, EVIDENCE, E. (a) pl. 99.

B. (ee) 49 *Geo. III. cap.* 123. *s.* 35. *(Prize money.)*

64. A prize agent receiving orders for prize money from seamen while regularly licensed, may obtain payment under these orders after his licence has expired. *Rex* v. *Davis*, 4 Campb. 48. Ellenborough, C. J. 1814.

B. (ff) 52 *Geo. III. cap.* 39. *s.* 30. *(General Pilot act.)*

65. The captain of a vessel in the river Thames, who has a pilot on board, is not liable for damage done to another vessel, unless the mischief be immediately imputable to himself. *Bennet and another* v. *Morta*, Holt, 359. Gibbs, C. J. 1816.

And see *Carruthers* v. *Sydebotham*, 4 M. & S. 77; ante, SHIP, pl. 127.

B. (gg) 52 *Geo. III. cap.* 130. *s.* 2. *(Demolishing manufactories.)*

66. The burning of manufactories may be described as demolishing, though burning is expressly mentioned in the act. *Nesham and others* v. *Armstrong and others*, Holt, 466. Bayley, J. Durham, 1816.

67. *Semble*, that a staith, part of a colliery, is not within the act. *Ibid.*

STOCK.

(And see ante, AGENT, pl. 78; BOND, B. 12; CONDITIONS PRECEDENT, B. 7, 8; DEBTOR AND CREDITOR, B. 5; post, USURY, pl. 1, 8, 12.)

1. A transfer of stock by the debtor to the creditor, is evidence of payment on a plea of *solvit post diem*. *Breton* v. *Cope, executor*, Peake, 30. Kenyon, C. J. 1791.

2. A bill given for the amount of differences upon stock-jobbing transactions, is void in the hands of an indorsee *with notice*. *Steers* v. *Lashley*, 1 Esp. 166. Kenyon, C. J. 1794.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 6 T. R. 61

3. *Omnium* is stock within the meaning of the statute against stock-jobbing. *Brown* v. *Turner*, 2 Esp. 631. Kenyon, C. J. 1798.

4. The holder of omnium is potentially a holder of stock. *Oliviérson* v. *Coles*, 1 Stark. 496. Ellenborough, C. J. 1816.

5. And he may sue a party for not replacing stock for the amount of omnium transferred by him to such party. *Ibid.*

STOPPAGE IN TRANSITU.

(And see ante, FRAUDS, STATUTE OF, C. (a); post, TROVER; VENDOR AND PURCHASER, B.)

A. BY WHOM.

B. OF WHAT SPECIES OF PROPERTY.

C. AT WHAT PERIOD.

D. EFFECT OF.

A. BY WHOM.

1. A. ships goods and sends the bill of lading to B. but *by mistake*, o . . .

indorse it. B. sells to C. A. sends an indorsed bill of lading to D. informing him of the circumstance. D. cannot stop the goods on their arrival. *Dick* v. *Lumsden*, Peake, 189. Kenyon, C. J. 1793.

B. Of what species of property.

2. A remittance of money for a particular purpose may be stopped in transitu. *Smith and others, assignees of Staples,* v. *Bowles and others,* 2 Esp. 578. Kenyon, C. J. 1797.

3. *Secus,* of a general remittance from a debtor to his creditor. *Ibid.*

And see *Wiseman* v. *Vandeputt,* 2 Vern. 203; *Hodgson* v. *Loy,* 7 T. R. 440, 6; *Feise* v. *Wray,* 3 East, 93; S. C. 2 Smith, 674; ante, Bankrupt, pl. 101.

C. At what period.

4. Goods paid for by an acceptance cannot be stopped by the vendor, until bill is dishonored. *Davis* v. *Reynolds,* 4 Campb. 268, 1 Stark. 115. Ellenborough, C. J. 1815.

And see post, Trover, A. 12.

5. Possession obtained by the consignee before the completion of the voyage, will not divest the right of the consignor to stop the goods. *Holst* v. *Pownal and Spencer,* 1 Esp. 240. Kenyon, C. J. 1794.

And the court of K. B. refused a rule for a new trial. *Ibid.*

Acc. Abbott, L. S. part 3, chap. 9. sect. 13.

Cont. *Mills* v. *Ball,* 2 Bos. & Pul. 457, 61.

And see *Bohtlingh* v. *Inglis,* 3 East, 381, 9.

6. A claim made by the consignor upon the carrier or middle-man, is sufficient without actual possession. *Holst* v. *Pownal, ubi supra.*

7. S. P. ruled in *Northey and Lewis, assignees of Leyland and Cragg,* v. *Field,* 2 Esp. 613. Kenyon, C. J. 1797.

And see *Snee* v. *Prescott,* 1 Atk. 245. *D'Aquila* v. *Lambert, Ambler,* 399; *Bohtlingh* v. *Inglis,* 3 East, 381, 94.

8. The vendor of goods countermands the delivery to the vendee, they are however delivered to the latter, through the mistake of the carrier's servants, and upon the vendee's becoming bankrupt are sold by his assignees; the vendor may recover the value in trover against the assignees. *Litt and another* v. *Cowley and others,* Holt, 338. Gibbs, C. J. 1816. Post, pl. 16.

9. Goods deposited at the king's warehouse on their arrival, for the duties under 26 Geo. III. cap. 59, s. 4, may be stopped *in transitu,* although they have been *claimed* by the consignee. *Northey* v. *Field, ubi supra.*

S. P. *Nix* v. *Olive,* Abbott, 422.

10. Held, that the putting of goods on board a vessel *chartered by the consignee,* is a complete delivery, after which there can be no stoppage in transitu. *Boehtlinck* v. *Schneider,* (*Inglis*) *assignee of Crane,* 3 Esp. 58. Kenyon, C. J. 1799.

Sed vide 3 East, 381. S. P. between the same parties, contra.

And see *Walker* v. *Woodbridge,* Co. B. L. 394.

11. Goods sold to A., and by his directions sent to a wharfinger, to be forwarded to him, may be stopped in transitu in the wharfinger's hands. *Smith and another* v. *Goss,* 1 Campb. 282. Ellenborough, C. J. 1800.

12. But where goods are delivered to a packer appointed by the vendee, to be forwarded to any port the latter may appoint, and the goods are opened and examined by the vendee's agent, the right of stoppage in transitu is gone. *Leeds* v. *Wright,* 4 Esp. 243. Alvanley C. J. 1802.

And the court of C. P. refused a rule for a new trial. 3 Bos. & Pul. 320.

Acc. *Dixon* v. *Baldwin,* 5 East, 175, 84; and see 2 Saund. 47 g, h.

13. So where they are delivered to a warehouseman to whom the vendee pays warehouse rent, though they have not reached their ultimate destination. *Wright* v. *Lawes,* 4 Esp. 82. Kenyon, C. J. 1801.

And see *Richardson* v. *Goss,* 3 Bos. & Pul. 127; *Stoveld* v. *Hughes,* 14 East, 308.

14. *Secus,* if any thing remain to be done to the goods before the price can be ascertained. *Withers and another* v. *Lyss and others,* 4 Campb. 237. Gibbs, C. J. 1815.

And see post, Vendor, B.

15. A. receives a dock delivery order for goods entered in the books of the West India Dock in his name. A., upon selling the goods to B., indorses the order to him. B. sells the goods to C. on credit, and delivers the order. Held, that on C.'s insolvency, A. cannot take possession of the goods, though they continue in his name, and the order has not been lodged with the Dock Company. *Spear* v. *Travers and another*, 4 Campb. 251. Gibbs, C. J. 1815.

16. Goods delivered to the packer of the purchaser, upon an understanding that they were to be paid for in ready money, may be stopped in transitu. *Loeschman* v. *Williams*, 4 Campb. 181. Ellenborough, C. J. 1815.

And see Pothier, Contrat. de Vente, p. 5, chap. 1, art. 2, num. 324; *Bishop* v. *Shillito*, 2 B. & A. 329, n. ante, pl. 8.

17. If the vendors receive, from the vendee, warehouse rent for the goods remaining in their warehouse beyond the period at which they ought to have been removed, the delivery is complete, and the right of stopping in transitu is gone. *Hurry and others* v. *Mangles and others*, 1 Campb. 452. Ellenborough, C. J.

18. If the vendor take a receipt from the wharfinger, as for goods received from the vendor, the delivery is complete. *Noble* v. *Adams*, Holt, 248. Gibbs, C. J. 1816.

19. The right of the vendor to stop goods in transitu, is not divested by a foreign attachment at the suit of a creditor of the vendee. *Smith* v. *Goss*, *ubi supra*.

Acc. *Oppenheim* v. *Russell*, 3 Bos. & Pull. 42.

20. Where, with the privity of the vendor, the wharfinger in whose custody the goods lie, charges the vendee with warehouse rent, he holds them for the vendee, and they are no longer subject to stoppage in transitu. *Harman and others, assignees, &c.* v. *Anderson and another*, 2 Campb. 243. Ellenborough, C. J.

S. C. cited 14 East, 593.

21. And if the vendee receive from the vendor an order for the delivery, which he lodges with the wharfinger, the same effect is produced, though no transfer be made in the wharfinger's books. *Ibid.*

And a rule for a new trial on the latter ground, was refused. *Ibid.*

22. The shipper of goods takes a receipt from the captain, who executes a bill of lading in favour of a sub-vendee. The shipper may stop the goods in transitu, and, upon a refusal of the captain, may maintain trover against him. *Craven and others* v. *Ryder*, Holt, 100. Dallas, J. 1815.

And the court of C. P. refused a rule to set aside the verdict. *Ibid.* 2 Marsh, 127.

23. A West India Dock warrant, indorsed and delivered for a valuable consideration, passes the property so as to destroy the right of stoppage in transitu. *Zwinger and another*, v. *Samuda*, Holt, 395. Park, J. 1816.

And the court of C. P. discharged a rule for a new trial. H. T. 1817. *Ibid.* and 7 Taunt. 265; 1 B. Moore, 12.

See Appendix.

24. A. being indebted to B. on the balance of accounts, including bills accepted by B. for A. consigns goods to B. on account of this balance. A. has no right to stop the goods in transitu, upon B. becoming insolvent before the bills are paid. *Vertue and another* v. *Jewell*, 4 Campb. 31. Ellenborough, C. J. 1814.

D. Effect of.

25. Where goods, sold to be paid for on delivery, are stopped in transitu, the vendor may still maintain an action for goods bargained and sold, if he offer to deliver them on being paid. *Kymer and others* v. *Sumercropp*, 1 Campb. 109. Ellenborough, C. J. 1807.

And see ante, Assumpsit, pl. 38.

SURETY.

(And see ante, Agent, pl. 116; Bond, pl. 22, 3; Debtor and creditor, pl. 10.)

A. When discharged.

B. Contribution.

B. (a) *To what extent.*

A. When discharged.

(And see ante, Assumpsit, pl. 46.)

1. Creditor, by giving further credit to principal, does not discharge surety, except where he has disabled himself from suing. *Hamilton* v. *Stratton*, Sittings at Westminster, 9th July, 1819. Abbott, C. J.

And see *Bank of Ireland* v. *Beresford*, 5 Dow, 234; *Boultbee* v. *Stubbs*, 18 Ves. 20.

2. Time given to one co-surety does not discharge the rest. *Dunn* v. *Slee*, Holt, 399. Park, J. 1816.

B. Contribution.

(And see ante, Action, pl. 47; Assumpsit, pl. 40, 41, 42.)

B. (a) *To what extent.*

3. In an action for contribution against a co-surety, a declaration by the obligee as to the account to which he carried money paid him by the principal obligor is not evidence, unless the declaration were made at the time of payment. The obligee must be called. *Dunn* v. *Slee*, Holt, 399. Park, J. 1816.

TAXES.

(And see post, Witness, C. (n).)

1. A sale of the estate of a bankrupt before the commissioners, *by a mortgagee*, is liable to the auction duty. *Coare* v. *Creed*, 2 Esp. 699. Kenyon, C. J. 1798.

2. In an action for use and occupation, the property tax will not be taken into consideration at nisi prius. *Pocock* v. *Eustace*, 2 Campb. 181. Ellenborough, C. J. 1809.

And see *Clennel* v. *Read*, 7 Taunt. 50.

3. Unless it has been paid before action brought. *Baker* v. *Davis*, 3 Campb. 474. Ellenborough, C. J. 1813.

And see *Fuller* v. *Abbott*, 4 Taunt. 105.

TENDER.

(And see ante, Conditions precedent, B. 7; Practice, C; Set off.)

A. Form of tender.

B. To whom made.

C. At what time.

D. Where necessary.

E. Conditional tender.

F. Effect of tender.

G. How avoided.

A. Form of tender.

1. Tender in Bank of England notes is sufficient, unless specially objected to. *Brown* v. *Saul*, 4 Esp. 267. Ellenborough, C. J. 1803.

S. P. *Wright* v. *Reed*, 3 T. R. 554.

And for the exception, see *Grigby* v. *Oakes*, 2 Bos. & Pul. 526.

2. And it is stated to have been held, that a tender in a Liverpool bank bill of exchange is good, if not specially objected to. *Lockyer* v. *Jones*, Peake, 180, n. Kenyon, C. J. 1796.

3. But, in a subsequent case, a tender in a Bristol bank bill was held not to be good, though the party made no objection to the form of the tender. *Mills* v. *Safford*, Peake, 180, n. Exch. E. T. 1808.

4. The debtor sends money to the house of the creditor. A servant takes it in, and returns it with an answer, purporting to be from the master. This evidence to go to a jury. *Anonymous*, 1 Esp. 349. Kenyon, C. J. 1795.

See *Pilkington* v. *Hastings*, 5 Co. 76; S. C. better reported, Cro. El. 813.

And see post, G. pl. 37.

5. An offer to pay money as a *boon*, accompanied with a protestation against the party's *right*, is not a legal tender. *Simmons* v. *Wilmot and others*, 3 Esp. 91. Eldon, C. J. 1800. Post, pl. 23, 4.

6. Defendant threw a guinea and some bank notes on a table, saying to plaintiff, "there is the balance of the account." Plaintiff refused to take up

the money and went away, upon which the money was counted over by the witness, and found to amount to 17l. 1s. Held to be sufficient evidence to support a plea of a tender of that sum. *Holland* v. *Phillips*, 6 Esp. 46. Mansfield, C. J. 1806.

7. *Semble*, that evidence of a tender of 4l. 19s. 6d. will not support a plea of a tender of 4l. 9s. 6d. *Watkins* v. *Robb*, 2 Esp. 711. Kenyon, C. J. 1798.

And see post, G. pl. 32. Anon. Fra. Moore, 47; Wade's case, 5 Co. 114; Co. Litt. 208, a; Noy's Rep. 74; *Palliser* v. *Ord*, Bunb. 166.

8. *Semble*, that a tender of a 5l. note, accompanied with a demand of 6d. change, is not a good tender of 4l. 19s. 6d. *Ibid.*

9. So if a debtor produce a 5l. note, and desire his creditor to take 3l. 10s. of it, the tender is insufficient *Betterbee* v. *Davis*, 3 Campb. 70. Le Blanc, J. Gloucester, 1811.

10. If several creditors to whom money is due in the same right, assemble for the purpose of demanding payment, a tender of one gross sum, which they all refuse on account of the insufficiency of the amount, is good. *Black* v. *Smith*, Peake, 88. Kenyon, C. J. 1791.

And see Dame Gresham's case, Moore, 261, 2, 1st point; 2 T. R. 414.

11. Held, that where the creditor insists upon a larger sum being due than that which the debtor offers to pay, the money need not be produced. *Ibid.*

12. But, in a subsequent case, it was held, that the money must be shewn, unless the creditor expressly dispense with the production of it. *Dickinson* v. *Shee*, 4 Esp. 68. Kenyon. C. J. 1801.

And see *Douglas* v. *Patrick*, 3 T. R. 684; *Thomas* v. *Evans*, 10 East, 101, 3.

13. A debtor offers to pay a certain sum, which the creditor refuses to receive, on account of the insufficiency of the amount. This is not a good tender, unless it appears that the debtor had the money with him ready to be produced, in case the offer had been accepted. *Glascott* v. *Day*, 5 Esp. 48. Ellenborough, C. J. 1803.

B. To whom made.

14. *Semble*, that where a tender to the defendant is pleaded in bar to a cognizance for rent, and issue is joined thereon, evidence of a tender to the defendant's agent will not support the plea, a bailiff having no power to delegate his authority. *Pimm* v. *Grevill*, 6 Esp. 95. Ellenborough, C. J. 1807.

15. A tender to an agent authorized to receive money, is a good tender to the creditor. *Goodland* v. *Blewith*, 1 Campb. 477. Ellenborough, C. J. 1808.

C. At what time made.

(And see ante, Attorney, pl. 30.)

16. Tender after the day cannot be pleaded to debt on bond, under 4 Ann. cap. 16. s. 12. *Dixon*, v. *Parkes et alt.* 1 Esp. 110. Kenyon, C. J. 1794.

Acc. *Player* v. *Bandy*, 10 Mod. 26.

And see 2 Saund. 48 a, n. Keilw. 74, pl. 21.

N. Tender of rent *before* the day, appears not to be pleadable; see Co. Litt. 315, *a*. 4 Co. 10, a.

17. *Semble*, that where the declaration is entitled generally of the term, the defendant cannot give in evidence a tender made after the first day of the term, though he should be able to shew that the latitat was sued out after the tender. *Rolfe* v. *Norden*, 4 Esp. 72. Le Blanc, J. 1801.

And see *Southouse* v. *Allen*, Selw. N. P. 146. Tidd, 360.

D. Where necessary.

18. *Semble*, that if a traveller be permitted to go into a post-chaise, and to put on his luggage, he may insist on having the journey performed without tendering the fare. *Massiter* v. *Cooper*, 4 Esp. 260. Ellenborough, C. J. 1803. Ante, Action on the case, pl. 70.

19. But, at all events, if he tender a sum, which the post master has stated to be the proper fare, it is a breach of contract not to perform the journey. *Ibid.*

E. Conditional tender.

20. Though the debtor insist upon a receipt *in full*, the tender is good, if objected to at the time merely on the ground of the insufficiency of the

amount. *Cole and another* v. *Blake*, Peake, 179. Kenyon, C. J. 1793.

N. This case appears to have been considered with reference to the general right of a debtor to demand a receipt upon paying money to his credit; which right was said to have been determined not to exist, except in the cases of payment to the king's receiver. Bunb. 348. Sed vide Fitzh. Damage, 75. And see Bro. Abr. Taile d'Exchequer, 7. But, by 43 Geo. III. cap. 126. s. 5. a debtor is authorised to tender a blank receipt at the time of payment, which the creditor cannot refuse to sign, without incurring a penalty of 10l.

The particular form of the receipt *(in full)* in the principal case, does not appear to have been adverted to.

21. And, in a subsequent case, it was held, that a tender accompanied with a demand of a receipt *in full*, is bad. *Glascott* v. *Day*, 5 Esp. 48. Ellenborough, C. J. 1803.

And see post, F. 28.

22. S. P. ruled in *Huxham* v. *Smith*, 2 Campb. 21. Ellenborough, C. J. 1809

23. Or to be accepted as the whole balance due. *Evans* v. *Judkins*, 4 Campb. 156. Gibbs, C. J. 1815.

24. S. P. *Free* v. *Kington*, K. B. T. 1815. *Ibid.*

25. Or, if the party require that a security be delivered up to be cancelled. *Huxham* v. *Smith*, *ubi supra.*

26. But a tender of money due upon a promissory note, accompanied with a demand of the note, is sufficient to stop the running of interest. *Dent* v. *Dunn*, *executrix*, &c. 3 Campb. 296. Ellenborough, C. J. 1812.

And see *Hume* v. *Peploe*, 8 East, 168; 4 Leon. 209, pl. 338.

F. Effect of tender.

(And see ante, Justices, pl. 16; Partner; Practice, C. (a); C. (b); Set off, D. (b) 38; D. (e).

27. The payment of money into court on a plea of tender to a count on a promise to pay the debt of another in consideration of forbearance, is such an admission of the contract as precludes the necessity of proving an undertaking in writing. *Middleton* v. *Brewer*, Peake, 15. Kenyon, C. J. 1790.

And see 1 Wms. Saund. 33. c. and cases there collected.

28. When a tender is made, the creditor may accept the sum tendered, without prejudicing his right to sue for more. *Spybey* v. *Hide*, 1 Campb. 181, 3. Ellenborough, C. J. 1808.

29. *Semble*, that there can be no nonsuit after a tender. *Harding* v. *Spicer*, 1 Campb. 327. Heath, J. Kingston, 1808.

And see *Gutteridge* v. *Smith*, 2 H. Bl. 377; *Paxton* v. *Popham*, 10 East, 366, 8; Tidd, 838.

30. After a tender by agent, and refusal, the money in the agent's hands is at the risk of the *debtor*. *Ibid.*

Vide tamen post, Vendor and Purchaser, B. 4, n.

G. How avoided.

31. Where the plaintiff replies an *original* sued out before tender, it is sufficient to produce the *capias ad respondendum*. *Gosling* v. *Witherspoon*, 2 Wms. Saund. 1, e. Kenyon, C. J. 1788.

32. Upon a replication of a subsequent demand and refusal, it lies on the plaintiff to shew that the sum demanded was the precise sum stated in the plea. *Spybey* v. *Hide*, 1 Campb. 181. Ellenborough, C. J. 1808.

33. And that the demand was made by a person authorised to receive the amount. *Coore* v. *Callaway*, 1 Esp. 115. Kenyon, C. J. 1794.

And see *Palliser* v. *Ord*, Bunb. 166.

34. Which the clerk of plaintiff's attorney has not. *Ibid.*

35. And to give the debtor a discharge. *Coles* v. *Bell*, 1 Campb. 478, n. Ellenborough, C. J. 1809.

36. A subsequent demand, accompanied with a demand of another sum not due, is insufficient. *Coore* v. *Callaway*, *ubi supra.*

Acc. *Strutt* v. *Rogers*, 7 Taunt. 213.

And see ante, D.

37. To shew a subsequent demand, proof of the delivery of a letter at the defendant's house, to a clerk who returns with an answer "that the debt shall be settled," is *primâ facie* sufficient. *Hay-*

ward v. Hague, gent. 4 Esp. 93. Lawrence, J. 1802.

And see ante, A. 4.

38. Where a tender to the landlord is pleaded in bar to a cognizance for rent, and the defendant replies a subsequent demand, made by himself and a refusal, evidence made of a demand by the defendant's agent is not sufficient. *Pimm* v. *Grevill*, 6 Esp. 95. Ellenborough, C. J. 1807.

39. A tender made by A. & B. who are jointly liable, is invalidated by a subsequent refusal by A. *Peirse* v. *Bowles and another*, 1 Stark. 323. Ellenborough, C. J. 1816.

TIME.

(And see ante, INSOLVENTS, pl. 1.)

A. HOW COMPUTED.

B. PRIORITY.

C. CONSEQUENCES OF GIVING TIME.

A. HOW COMPUTED.

1. Upon a charter party at so much per month, the *jury found*, that the customary calculation is by calendar months. *Jolly* v. *Young*, 1 Esp. 186. Kenyon, C. J. 1794.

2. But in a case upon the construction of 26 Geo. III. cap. 50, 28 Geo. III. cap. 20, and 29 Geo. III. cap. 53, it was ruled that lunar months must be intended, and that evidence of a custom amongst the revenue officers to compute the voyage by calendar months was inadmissible. *Lacon, knight, et alt.* v. *Hooper, et alt.* 1 Esp. 246. Kenyon, C. J. 1794.

And the court of K. B. discharged a rule for setting aside verdict. 6 T. R. 224.

And see *Brown* v. *Spence*, 1 Lev. 101; Com. Dig. Temps A; ante, ATTORNEY, pl. 24; BANKRUPT, pl. 39, 40, 1.

Sed vide *Baker* v. *Catesby*, Yelv. 100; *Dormer* v. *Smith*, Cro. El. 835; 1 Hawk. P.C. 35; *Dyke* v. *Sweeting*, Willes, 585, 7, 8; *Lang* v. *Gale*, 1 M. & S. 111; Litt. Rep. 19.

3. If a bill of lading contained a memorandum, "*to be discharged in* 14 *days or pay five guineas a day demurrage*," evidence of usage may be adduced to shew that *working* days, and not *running* days are to be understood. *Cochran* v. *Retberg et alt.* 3 Esp. 121. Eldon, C. J. 1800.

4. A patent dated 10th May, contained the usual proviso that a specification should be inrolled *within* one calendar month *after* the date. The specification was not inrolled till the 10th June. Held, that the month began on the 11th May, and included the 10th June. *Watson* v. *Pears*, 2 Campb. 294. Ellenborough, C. J. 1809.

S. P. *Thomas* v. *Topham*, Dyer, 218, b; Fra. Moore, 40, anon. but S. C.; Clayton's case, 5 Rep. 1, b. And see *Glassington* v. *Rawlins*, 3 East, 407.

B. PRIORITY.

5. Where goods are seized under a *fi. fa.* on the day on which the defendant commits an act of bankruptcy, it must be inquired which had the priority. *Sadler, assignee of Knight*, v. *Leigh and another*, 4 Campb. 195, 7. Ellenborough, C. J. 1815.

N. 21 Jac. 1. cap. 19. sect. 9. destroys the securities of creditors on goods "whereof there is no execution or extent sued *and executed*." And see *Philips* v. *Thomson*, 3 Lev. 191.

C. CONSEQUENCES OF GIVING TIME.

6. A creditor by giving further time to his debtor does not discharge the surety, except where he has disabled himself from suing. *Hamilton* v. *Stratton*. Abbott, C. J. 1819.

And see ante, SURETY, A.

TITHES.

1. Upon a general agreement for the retaining of tithes for so much per annum, where no time is specified for the payment, interest cannot be de-

manded. *Shipley* v. *Hammond*, 5 Esp. 114. Ellenborough, C. J. 1804.

2. But it was held, that where the composition is payable on a day certain, the tithe owner is entitled to interest. *Ibid.*

Sed vide ante, INTEREST, A.

3. The occupier is bound to *tedd* the grass, before he puts it into grass cocks for tithing; after which the parson is to make it completely into hay. *Newman*, *esq.* v. *Morgan*, 1 Campb. 305. Heath, J. Chelmsford, 1808.

And the court of K. B. refused a new trial. *Ibid.* and 10 East, 5.

Acc. *Halliwell* v. *Trappner*, 2 Taunt. 55, 6.

And see *Smith* v. *Sambrook*, 1 M. & S. 66.

4. No action therefore will lie against the parson for not taking away the tithe of grass set out in the *swath*. *Moyes* v. *Willett*, *clerk*, 3 Esp. 31. Buller, J. Chelmsford, 1799.

5. Where there is a *private* road through a farm, the parson may use it for carrying away his tithe, although there be another *public* road nearly equally convenient, and the farmer do not, on that particular occasion, use the private road himself. *Cobb*, *clerk*, v. *Selby*, 6 Esp. 103. Macdonald, C. B. Maidstone, 1806.

TITLE.

(And see ante, ASSUMPSIT, C. (e); E. (c) pl. 80, 1, 2, 3; PLEADING, pl. 1; post, TROVER, A.)

A. HOW PROVED.

(a) *Under an Act of Parliament.*

(b) *By assignee of term.*

A. HOW PROVED.

A. (a) *Under an Act of Parliament.*

1. A statute directing the manner in which a canal company shall convey land, enacts, that " every such conveyance shall be *valid*." This does not cure any defect of *title*. *Ward* v. *Scott*, 3 Campb. 284. Ellenborough, C. J. 1812.

A. (b) *By assignee of a term.*

2. The remote assignee of a term cannot prove his interest without proving the original lease, and all the mesne assignments. *Crosby* v. *Percy*, 1 Campb. 303. Mansfield, C. J. 1808.

Sed vide post, VENDOR AND PURCHASER, F. 12; *Earl* v. *Baxter*, 2 Bla. 1228. And see *Doe* v. *Parker*, Peake's Ev.

TOLL.

1. A waggon returning from London loaded with *dung* is exempted by 14 Geo. III. cap. 82. sect 3. from being weighed and charged for overweight, notwithstanding it carry home an empty basket and bottles, these not being *goods or merchandise* within the meaning of 13 Geo. III. cap. 84. s. 1. *Chambers* v. *Eaves*, 2 Campb. 393. Ellenborough, C. J. 1810.

2. It is not extortion to take toll from a party who is exempted from the payment of toll, unless the ground of the exemption be stated at the time. *Rex* v. *Hamlyn*, 4 Campb. 379. Ellenborough, C. J. 1816.

TRESPASS.

(And see ante, ABATEMENT B. (c); PLEADING, B. (d).)

A. TO PERSONS.

(a) *Where it lies.*

(b) *Pleadings.*

(c) *Evidence.*

(d) *Verdict.*

B. TO PERSONAL PROPERTY.

(a) *Where it lies.*

(b) *Pleadings.*

(c) *Evidence.*

(d) *Verdict.*

C. To real property.

(a) *Where it lies.*

(b) *Pleadings.*

(c) *Evidence.*

A. To persons.

(And see ante, Imprisonment.)

A. (a) *Where it lies.*

1. A constable who receives a charge, is justified in committing the party charged, unless he colludes with the complainant. *White* v *Taylor and Simcoe*, 4 Esp. 80. Le Blanc, J. 1801.

And see post, Variance, pl. 39.

2. In the absence of evidence to that effect it is not a question for the jury, whether the constable exercised a proper degree of discretion. *Ibid.*

3. A father may maintain trespass *per quod servitium amisit*, against a person who seduces a daughter by whom his household work is done, although she be living in service, and do not sleep in the father's house. *Mann* v. *Barrett*, 6 Esp. 32. Heath, J. Chelmsford, 1806.

And see Action on the case, A (c).; post, pl. 9.

4. A master, upon the seduction of his servant, may recover damages beyond the mere loss of service, though not related to her. *Forrs* v. *Wilson*, Peake, 55. Kenyon, C. J. 1791.

Acc. *Irwin* v. *Dearman*, 11 East, 23.

5. A person who causes another to be impressed does it at his own peril, and is liable to an action if the party be not subject to the impress service. *Flewster* v. *Royle, widow*, 1 Campb. 187. Ellenborough, C. J. 1808.

6. Where A. is apprehended under a judge's warrant against B., neither the officers who take A., nor those who innocently receive him, can justify under the process. *Aaron* v. *Alexander, Crowley, and Solomons*, 3 Campb. 35. Ellenborough, C. J. 1811.

7. An attorney acting in fair discharge of his duty should not be made a co-defendant in an action of trespass and false imprisonment brought against his client. *Sedley* v. *Sutherland and others*, 3 Esp. 202. Kenyon, C. J. 1800.

A. (b) *Pleadings.*

(See *Staight* v. *Gee*, ante, Officer, pl. 16; *Nathan* v. *Cohen*, *ibid.* pl. 17; Pleading, pl. 49, 51.)

A. (c) *Evidence.*

(And see ante, Officer, pl. 25, 26, 27, 28.)

8. Nothing can be given in evidence under the *alia enormia* which might have been put upon the record, and which it would not have been inconsistent with decency to state. *Lowden* v. *Goodrick*, Peake, 46. Kenyon, C. J. 1791.

9. In trespass for assaulting plaintiff's son and servant, *per quod, &c.* it is sufficient to shew that the son lived in his father's family and under his protection; without proving actual service. *Jones* v. *Brown and another*, Peake, 233, and 1 Esp. 217. Kenyon, C. J. 1794.

Vide tamen *Gray* v. *Jefferies*, Cro. El. 55; *Barham* v. *Dennis*, *ibid.* 770; *Postlethwaite* v. *Parker*, 3 Burr. 1878; *Bennett* v. *Allcott*, 2 T. R. 166, 8.

10. If, in an action against A. and B., the plaintiff prove a trespass in which A. alone was implicated, he cannot afterwards offer evidence of a *joint* trespass. *Sedley* v. *Sutherland and others*, 3 Esp. 202. Kenyon, C. J. 1800.

11. Where a declaration for assault and battery contains but one count, the plaintiff, after proving one assault, cannot wave it, and go on to prove another. *Stante* v. *Pricket*, 1 Campb. 473. Ellenborough, C. J. 1808.

12. Where, upon an issue on son assault demesne, the defendant proves that he was assaulted before the day mentioned in the declaration, the plaintiff cannot give in evidence an assault on the day without new assigning. *Randle* v. *Webb*, 1 Esp. 38. Buller, J. Chelmsford, 1793.

N. In this case the declaration must, it would seem, have stated one assault only. And see post, C. (c) pl. 34.

S. P. contra, *Thornton* v. *Lyster*, Cro. Car, 514. Sed vide Bull. N. P. 17; *Tyler* v. *Wall*, Cro. Car. 228; Anon. 2 Lord Raym. 1015. And see 2 Wms. Saund. 5, g. *Barnes* v. *Hunt*, 11 East,

451; *Pywell* v. *Stow*, 3 Taunt. 425; *Oakley* v. *Davis*, 16 East, 82.

13. No proof of special damage in the loss of lodgers is admissible, unless the names of such lodgers be stated in the declaration. *Westwood* v. *Cowne*, 1 Stark. 172. Ellenborough, C. J. 181 .

And see *Hartley* v. *Herring*, 8 T. R. 130; *Fenn* v. *Dixe*, 1 Roll. Abr. 58; Vin. Abr. 469; Bull, N. P. 7; 2 Wms. Saund. 411, n. (4).

A. (d) *Verdict.*

14. In trespass and assault against two, the jury should give a *joint* verdict to the amount which they think the most culpable ought to pay. *Brown* v. *Allen and Oliver*, 4 Esp. 158. Ellenborough, C. J. 1802.

Acc. Heydon's case, 11 Co. Rep. 5.

15. Where a personal injury has been occasioned by the wrongful act of the defendant, expenses which the plaintiff is under a legal obligation to pay, form part of the damages to be assessed. *Dixon* v. *Bell*, 1 Stark. 287. Ellenborough, C. J. 1816.

B. To PERSONAL PROPERTY.

(And see ante, COSTS, 4, 6; MISNOMER, 5.)

B. (a) *Where it lies.*

16. After the expiration of the term, the lessee enters and removes a brick building erected for a manufactory. He may justify the *asportation*, though he is a trespasser quoad *the re-entry*. *Penton* v. *Robart*, 4 Esp. 33. Kenyon, C. J. 1801.

And the court of K. B. set aside a nominal verdict for the plaintiff on the *asportation*. *Ibid.* and 2 East, 88.

17. A. *gratuitously* permits B. to use his carriage. A. still remains in legal possession, and may maintain trespass for an injury done to the carriage whilst it is so used. *Lotan* v. *Cross*, 2 Campb. 464. Ellenborough, C. J. 1810.

18. *Secus*, if A. *let* his carriage to B. for a certain time. *Ibid.*

And see post, TROVER, pl. 1.

19. Throwing down and breaking a jar will support a count for an asportation and conversion. *Gosson* v. *Graham*, 1 Stark. 55. Ellenborough, C. J. 1815.

B. (b) *Pleadings.*

(And see post, B. (d) pl. 25.)

20. In trespass where the defence is a distress for rent, after a clandestine removal from the premises, it must be specially pleaded. *Forneaux* v. *Fotherby and Clarke*, 4 Campb. 136. Ellenborough, C. J. 1815.

B. (c) *Evidence.*

21. Under a justification for shooting plaintiff's dog, which avers that the dog was worrying and attempting to kill defendant's fowl, and could not otherwise be prevented, it must be proved that the dog when shot was in the act of killing. *Janson* v. *Brown*, 1 Campb. 41. Ellenborough, C. J. 1807.

And see *Wright* v. *Ramscot*, 1 Saund. 84. *Vere* v. *Lord Cawdor*, 11 East, 569.

22. In trespass against a sheriff for seizing goods under a *fi. fa.* the warrant is sufficient to connect the defendant with the acts of the bailiff under the general issue; and it lies upon the defendant to prove the writ, in support of a plea justifying under it. *Grey* v. *Smith and another, sheriff of Middlesex*, 1 Campb. 387. Ellenborough, C. J. 1808.

And see ante, ACTION ON THE CASE, A. (g).

23. Defendant justifies the cutting of ropes as necessary for disengaging vessels which had run foul of each other. Under a new assignment, clear and wanton excess must be proved; not acts done under a fair impression of necessity. *Hockless et alt.* v. *Mitchell*, 4 Esp. 86. Kenyon, C. J. 1801.

And see post, C. (b) pl. 29; ante, PLEADING, F; RIVERS.

B. (d) *Verdict.*

24. Upon the general issue in trespass for destroying a picture, which appears to be a scandalous libel, the plaintiff is entitled to recover merely the value of the canvas and paint. *Du Bost* v. *Beresford*, 2 Campb. 511. Ellenborough, C. J. 1810.

25. And where such a picture has been openly exhibited, *qu.* whether defendant might not justify, as abating a public nuisance. *Ibid.*

C. To real property.

(And see ante, Costs, pl. 5, 6, 7, Distress, A (b).)

C. (a) *Where it lies.*

26. Where a tenant, after the expiration of his term, removes a brick building, erected for the purpose of a manufactory, though he may justify the *asportation*, the entry is a trespass. *Penton* v. *Robart*, 4 Esp. 33. Kenyon, C. J. 1801.

But the defendant having suffered judgment by default as to the *entry*, a nominal verdict for the plaintiff on the *asportation* was set aside. *Ibid.* and 2 East, 88.

C. (b) *Pleadings.*

27. A person renting a stall in the parish of A., which he uses occasionally, may justify under an easement claimed by the *inhabitants* of A. *Fitch* v. *Fitch*, 2 Esp. 543. Heath, J. Chelmsford, 1797.

28. A. is in the possession of a part of a house, and B. of the other part. An officer enters into A.'s part, under a writ against B.'s goods, none being there. A. may maintain an action against the officer for entering his house, and need not make a new assignment to a justification under the writ against B. *Fallon* v. *Anderson*, Peake, 109. Kenyon, C. J. 1792.

29. Declaration for entering house and staying therein three weeks, defendant justifies as to entering and staying 24 hours. The plea covers the whole, and the plaintiff must new assign if he relies upon the excess. *Monprivatt* v. *Smith and another, sheriff of Middlesex*, 2 Campb. 175. Ellenborough, C. J. 1809.

And see *Bousfield* v. *Blois, bart. sheriff of Essex*, Serjeant's Inn, Sittings before M. T. 1818, reported in Manning's Exchequer Practice, 634.

C. (c) *Evidence.*

30. Held, that a defendant cannot, under the general issue, prove title in a third person, and a command from him to enter. *Philpot* v. *Holmes*, Peake, 67. Kenyon, C. J. 1791.

[illegible]P. contra, *Argent* v. *Durrant*, 8 T. R. 403, 5.

And see *Graham* v. *Peat*, 1 East, 244, *Chambers* v. *Donaldson*, 11 East, 72.

31. Where, upon a plea justifying the abatement of a nuisance, the replication, without taking issue on the justification, new assigns unnecessary violence, the plaintiff cannot go into evidence to negative the nuisance. *Pickering* v. *Rudd*, 1 Stark. 56. Ellenborough, C. J. 1815.

And the court of K. B. refused a rule for a new trial. *Ibid.*

32. The keeping open of the doors of a house in which is a public billiard table, is a licence *in fact* to all persons to enter for the purpose of playing, and if the licence be abused the plaintiff must new assign. *Ditcham* v. *Bond*, 3 Campb. 525. Ellenborough, C. J. 1814.

33. In trespass *quare clausum fregit tali die et diversis aliis, &c.* the plaintiff may give in evidence any number of trespasses within the period specified. *Hume* v. *Oldacre*, 1 Stark. 357. Ellenborough, C. J. 1816.

34. But if he proves a trespass anterior to the first day, he must confine himself to that one trespass. *Ibid.*

And see ante, A. (c) pl. 12.

35. In an action for cutting down trees, excepted out of a lease, it may be shewn, in mitigation of damages, that the trees were applied towards purposes for which the plaintiff had covenanted to furnish timber by assignment of his bailiff, if there were sufficient timber on the demised premises. *Rennell and others* v. *Wither*. Abbott, J. Winchester Spring Assizes, 1818.

36. Or that they were exchanged for other timber used for those purposes. *Ibid. mutatâ opinione.*

TROVER.

(And see ante, BILLS AND NOTES, I. (e).)

A. TITLE OF PLAINTIFF.

B. CONVERSION BY DEFENDANT.

A. TITLE OF PLAINTIFF.

(And see ante, EXECUTOR AND ADMINISTRATOR, A; INSURANCE, pl. 43; post, VARIANCE, pl. 4.)

1. Lessor of house and *furniture*, cannot maintain trover for the *furniture*. *Gordon* v. *Harpur, esq. sheriff of Kent*, 2 Esp. 465. Hotham, B. Maidstone, 1796.

And the court of K. B. ordered the *postea* to be delivered to the defendant. 7 T. R. 9.

And see Y. B. 29, E. 4, fo. 10; *Berry* v. *Head*, Cro. Car. 242; S. C. Palm. 327; S. C. W. Jon. 255; *Bedingfield* v. *Onslow*, 3 Lev. 209; *Pyne* v. *Dore*, 1 T. R. 155; 2 Wms. Saund. 47, a, b, note 1; *Davies* v. *Connop*, 1 Price, 55; ante, SHIP, pl. 95, 98, 114, 120, 124, 126; TRESPASS, pl. 17, 18.

2. In trover for a ship, if the plaintiff produce the original register, and attempt unsuccessfully to deduce a title under it, he cannot afterwards rely upon his possession. *Sheriff* v. *Cadell*, 2 Esp. 617. Kenyon, C. J. 1797.

And see ante, BILLS AND NOTES, I. (a) pl. 294.

3. Trover lies for *part* of a ship. *Watson and wife, administrators of Maxwell*, v. *King*, 4 Campb. 272, and 1 Stark. 121. Ellenborough, C. J. 1815.

4. A custom for calico-printers to take to their own account goods damaged in the process, cannot alter the property in such goods without the consent of the owner. *Laclouch* v. *Towles*, 3 Esp. 114 Kenyon, C. J. 1800.

5. A carrier cannot set up a title in a stranger to defeat the right of the party from whom he receives goods. Anonymous, 3 Esp. 115. Gould, J. Maidstone.

Acc. Y. B. 7, H. 6, 22, pl. 3; and see ante, LITERARY PROPERTY, pl 7.

6. But he may shew that they were sent to the plaintiff by a third person to whom they belong. *Laclouch* v. *Towle*, *ubi supra*.

7. Defendant picked up a pocket-book containing four bank notes, amounting to 95l. which had been delivered out by a banker's clerk, in exchange for a cheque payable to the plaintiffs, *or bearer*. Held, that in the absence of any evidence of the cheque having been once negociated, and of any claim to the notes on the behalf of other persons, it must be presumed that they were the property of the plaintiffs. *Richard and John Greenstreet* v. *Carr*, 1 Campb. 551. Mansfield, C. J. 1808.

8. Lead is sent to a wharf in Southwark by the owner, to be kept there till he shall dispose of it. The wharfinger, who is also a dealer in lead, sells it as his own. This is not such a sale in market overt as changes the property; and trover may therefore be maintained against a *bonâ fide* vendee. *Wilkinson* v. *King and others*, 2 Campb. 335. Ellenborough, C. J. 1809.

9. And *semble*, that it would have made no difference if the wharf had been in London. *Ibid.*

10. If goods stolen be *pawned*, the property is not changed even in London. *Packer* v. *Gillies*, 2 Campb. 336, n. Ellenborough, C. J. 1806.

Acc. 35 H. 6, 25 b, where this point is fully considered by the twelve judges.

And see Plowd. 243; 1 Jac. I. cap. 21.

11. A. exchanges a watch for goods falsely warranted silver. He cannot, without proof of fraud, maintain trover for the watch. *Emanuel* v. *Dane*, 3 Campb. 299. Ellenborough, C. J. 1812.

S. P. *Power* v. *Wells*, Dougl. 24, n.

12. The indorsee of an unstamped bill of lading, a purchaser under a party who has paid for the goods by an unexpired acceptance, may prove his title by parol. *Davis* v. *Reynolds*, 1 Stark. 115. Ellenborough, C. J. 1815.

13. A bank note is paid by A. to B. and by B. to C., who presents it at the bank, where it is stopped. A., after paying the amount to C., cannot maintain trover against the bank. *Benjamin* v. *Bank of England*, 3 Campb. 417. Ellenborough, C. J. 1813.

14. An assignment executed by felon a fortnight before his trial, purporting

to be in trust to pay debts, will not entitle the assignee to recover, without proof of debts, or a *bonâ fide* consideration. *Shaw* v. *Bran*, 1 Stark. 319. Ellenborough, C. J. 1816.

15. A. sells wool to B. payable by bill at nine months, and B. resells to C. The wool had been weighed off, but remained in A.'s warehouse until B. became bankrupt. The bill had never been drawn, but samples had been delivered. Held, that there is an executed contract, and the property vested in C. *Green and another* v. *Haythorne and others*, 1 Stark. 447. Ellenborough, C. J. 1816.

N. The court seemed inclined to grant a new trial, but refused on the ground that A. on receiving C.'s order for delivery had given no answer, and lain by until the bankruptcy of B. *Ibid.*

B. CONVERSION BY DEFENDANT.

(And see ante, TRESPASS, pl. 19.)

16. The removal of goods, after a secret act of bankruptcy, is not purged by a subsequent notice not to sell. *Wyatt and another, assignees of Sheppard*, v. *Blades and another, late sheriff of Middlesex*, 3 Campb. 396. Ellenborough, C. J. 1813.

17. A warehouseman delivering goods upon a forged order is liable in trover, although the owner has neglected the means of recovering the property from the tortious possessor. *Lubbock and others* v. *Inglis*, 1 Stark. 104. Ellenborough, C. J. 1815.

And see ante, ASSUMPSIT, pl. 64.

18. Delivery of goods by a carrier to a stranger by mistake, is a conversion. *Youl* v. *Harbottle*, Peake, 49. Kenyon, C. J. 1791.

S. P. *Samuel* v. *Darch and others*, 2 Stark. 60. Ellenborough, C. J. 1817.

19. In *Devereux and others* v. *Barclay and another*, the plaintiffs were nonsuited on the ground that the conversion relied on was a misdelivery by vendors, who, from the length of time which had elapsed since the sale, were considered as having acquired the character of warehousemen. Abbott, C. J. Guildhall, 19 January, 1819.

But see proceedings on motion to set aside nonsuit, APPENDIX.

And see *Dufresne* v. *Hutchinson*, 3 Taunt. 117, 8; *Syeds* v. *Hay*, 4 T. R. 263.

20. *Secus*, where he *loses* the goods. *Ibid.*

And see *Ross* v. *Johnson*, 5 Burr. 2825; 2 Saund. 47, e.

21. A demand in writing *left at the house of the party*, is sufficient. *Logan* v. *Houlditch et alt.* 1 Esp. 22. Kenyon, C. J. 1793.

22. A demand of "the *amount* of the goods which you have disposed of," is sufficient. *Thomson, assignee of Abrahams*, v. *Shirley and Body*, 1 Esp. 31. Kenyon, C. J. 1793.

S. P. Rookeby's case, Clayton, 122, pl. 114.

23. And an action of trover brought upon a conversion of goods by a tortious sale, may be described in pleading, as an action prosecuted to recover the particular sum for which the goods were sold. *Batchellor and another* v. *Salmon*, 2 Campb. 525. Ellenborough, C. J. 1810.

And the court of K. B. refused a rule for a new trial. *Ibid.*

24. A refusal by a general agent, without proof of special direction, is not evidence of a conversion by the principal. *Pothonier and Hodgson* v. *Dawson*, Holt, 383. Gibbs, C. J. 1816.

25. A refusal to a party who makes the demand on the behalf of a third person, on the ground that the holder of the goods does not know to whom they belong, is not evidence of a conversion. *Solomons* v. *Dawes*, 1 Esp. 83. Kenyon, C. J. 1794.

Acc. per Coke, C. J. 2 Bulst. 312.

26. Nor if the holder refuse to deliver them until the claimant shall have proved his right. *Green* v. *Dunn*, 3 Campb. 215. Ellenborough, C. J. 1811.

27. Nor if he state, that he is not satisfied with respect to the authority of the person who makes the demand. *Solomons* v. *Dawes*, *ubi supra.*

28. A. mortgages an unfinished house to B. who works up some timber found on the premises belonging to C. This is a conversion, for which B. remains liable to C. even after eviction. *Williams* v. *Shaw*, 1 Esp. 93. Kenyon, C. J. 1794.

29. Trover will not lie against a

workman, who, upon being required to redeliver goods, makes frivolous excuses, and falsely denies that he has them in his possession. *Severn* v. *Keppell*, 4 Esp. 156. Ellenborough, C. J. 1802.

30. If B. take A.'s boat for the purpose of assisting A., or of preventing an injury which he is about to occasion to B.'s property, and in the attempt the boat is lost, it is not an illegal conversion. *Drake* v. *Shorter*, 4 Esp. 165. Ellenborough, C. J. 1802.

31. The sale of goods under a commission of bankrupt, which has improperly issued, does not amount to a wrongful conversion, if it appear that the supposed bankrupt recommended a broker for the purpose of selling the effects, and expressed himself perfectly satisfied with the commission. *Clarke* v. *Clarke and Brown*, 6 Esp. 61. Heath, J. Chelmsford, 1806.

And see 2 Saund. 47, i.

32. Goods are sent to a carrier to be forwarded to J. S. The carrier falsely asserts that he has delivered them to J. S. This is not evidence of a conversion. *Attersol* v. *Briant*, 1 Campb. 409. Ellenborough, C. J. 1808.

33. A warehouseman acknowledges in writing that he held goods on account of a purchaser. He cannot refuse to deliver them on the ground that the sale is incomplete. *Stonard* v. *Dunkin*, 2 Campb. 344. Ellenborough, C. J. 1810.

And see F. N. B. 138 M.

34. A warehouseman delivering goods to the party from whom he received them without notice of an intermediate change of property, is not liable in trover. *Townsend and others* v. *Inglis, Reed, Irving, and Co.* Holt, 278. Gibbs, C. J. 1816.

35. A statement by A. that he has sold B.'s carriage to C. *on B.'s account*, is not *primâ facie* evidence of a conversion. *English* v. *Charters*, 2 Stark. 30. Ellenborough, C. J. 1816.

36. Where a person who has a lien on goods, refuses to deliver them up without mentioning his lien, he is guilty of a conversion. *Boardman* v. *Sill*, 1 Campb. 410, n. Ellenborough, C. J. 1808.

37. If a *complete* verbal demand be made at the same time that a demand is made in writing, the former may be proved without producing the latter. *Smith, assignee of Tenant*, v. *Young*, 1 Campb. 439. Ellenborough, C. J. 1808.

38. Evidence of the contents of a written demand, is admissible without notice to produce the original. *Hammond and another* v. *Plank*, Peake, 166, n. Kenyon, C. J. 1796.

39. Proof that the defendant expressed his intention to withhold the chattel, but that it was not under his complete control at the time of the demand, is not evidence of a conversion. *Smith* v. *Young*, *ubi supra*.

40. A bailee of goods deposited to secure the repayment of a loan, may sell in case of non-payment. *Pothonier and Hodgson* v. *Dawson*, Holt, 383. Gibbs, C. J. 1816.

And see ante, ASSUMPSIT, pl. 38; STOPPAGE IN TRANSITU, pl. 25.

41. Trover lies after demand against pawnbroker for cloth delivered by plaintiff to his agent for the purpose of sale, and by him pawned, without production of the duplicate, notwithstanding 39 & 40 Geo. III. c. 99. s. 5, 15. *Peet* v. *Baxter*, 1 Stark. 472. Ellenborough, C. J. 1816.

42. A party whose lands are incumbered by a block of stone, is only justified in removing to a *convenient* distance. *Forsdick* v. *Collins*, 1 Stark. 173. Ellenborough, C. J. 1816.

43. No demand is necessary where there has been an actual conversion. *Ibid.*

44. Goods distrained by landlord and sold, without collusion, to plaintiff, who was trustee for the creditors of E. and left him in possession, are not liable to be taken under an execution against E. *Guthrie* v. *Wood*, 1 Stark, 367. Ellenborough, C. J. 1816.

TRUSTEE.

(And see ante, AGENT, pl. 123; EVIDENCE, H. (e); INSURANCE, pl. 39; LANDLORD AND TENANT, pl. 53; post, VENDOR AND PURCHASER, H. 3; WITNESS, C. (m).

1. Money paid by mistake to the trustees of an insolvent estate, cannot be

recovered from them after they have made a final dividend. *Fydell* v. *Clarke et alt.* 1 Esp. 447. Kenyon, C. J. 1796.

2. No action lies against trustees for breach of trust. *Allen and another, assignees of Prior,* v. *Imlett and another,* Holt, 641. Dallas, J. 1817.

And see ante, BANKRUPT, pl. 182.

3. Where trustees are bound to convey, it will be presumed that a conveyance has been executed. *Doe* d. *Bowerman* v. *Sybourn,* 2 Esp. 499. Kenyon, C. J. 1796.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 7 T. R. 2.

4. Submitting to arbitration does not make trustees personally liable, unless it be shewn that they have assets. *Davies* v. *Ridge and others,* 3 Esp. 101. Kenyon, C. J. 1800.

Sed vide *Barry* v. *Rush,* 1 T. R. 691; *Worthington* v. *Barlow,* 7 T. R. 453.

5. Admission of assets by one co-trustee will not bind the rest. *Ibid.*

And see ante, EXECUTORS AND ADMINISTRATORS, B. (a); B. (b).

USE AND OCCUPATION.

A. PLAINTIFF'S TITLE.

B. NATURE OF OCCUPATION.

C. EVIDENCE.

A. PLAINTIFF'S TITLE.

1. Vendee enters, and holds the premises until it is discovered that the vendor has no title. No action lies for use and occupation, *unless the occupation have been beneficial.* *Hearn* v. *Tomlin,* Peake, 192. Kenyon, C. J. 1793.

S. P. Dig. 12, 6, 65, 7.

And see *Kirtland* v. *Pounsett,* 2 Taunt. 145; VENDOR AND PURCHASER, A. (a) 3.

2. If the tenant abandon the premises without notice, the landlord is not precluded from recovering the subsequent rent by putting up a bill at the window, and endeavouring to procure another tenant. *Redpath* v. *Roberts,* 3 Esp. 225. Kenyon, C. J. 1800.

And see *Phipps* v. *Sculthorpe,* 1 B. & A. 50.

3. *Debt* for use and occupation may be maintained by a corporation aggregate. *Dean and Chapter of Rochester* v. *Pierce,* 1 Campb. 466. Ellenborough, C. J. 1808, and K. B. H. T. 1809.

And see Bro. Corporation, 47.

Sed vide *Rex* v. *Chipping Norton,* 5 East, 239, 42, 3; S. C. 1 Smith, 502, 3.

And see 6 Vin. Abr. Corporation, K. 41; *Rex* v. *Bigg,* 3 P. Wms. 423, 4, 5; Sav. 20, pl. 50.

And qu. whether assumpsit would not also lie. *Frevill* v. *Ewebancke,* 1 Roll Rep. [illegible]; *Mayor, &c. of London* v. *Gorry,* 2 Lev. 174; S. C. 1 Vent. 298; *Barber Surgeons* v. *Pelson,* 2 Lev. 252; *Yarborough* v. *Bank of England,* 16 East, 6.

4. Where the defendant has come into possession under the plaintiff, he cannot resist the payment of rent upon the ground of the plaintiff's title having expired, without shewing that he has disclaimed holding under the plaintiff, and has re-entered under a new landlord. *Balls* v. *Westwood,* 2 Campb. 11. Ellenborough, C. J. 1809.

S. P. arg. Keilw. 65; sed vide Co. Litt. 41, b. note, 237.

And see Co. Litt. 55 b, notes 372, 3; *Smith* v *Target,* 2 Anst. 529; *Johnson* v. *Atkinson,* 3 Anst. 798.

5. Submitting to a distress is an acknowledgment of the tenancy. *Panton, widow,* v. *Jones,* 3 Campb. 372. Bayley, J. Gloucester, 1813.

And see Co. Litt. 320, a; Vaugh. 39, *Dixon* v. *Harrison.*

6. Landlord mortgaged premises to A. and assigned equity of redemption to B. who afterwards purchased the legal estate from A. Held, that B. could recover from the tenant that part of the rent only which became due after he had acquired the legal estate. *Cobb* v. *Carpenter,* 2 Campb. 13, n. Ellenborough, C. J. 1809.

And see *Lumley* v. *Hodgson,* 16 East, 99.

N. Upon a general reservation the

rent would be payable at the end of the year. Latch, 264.

And see *Wolferston* v. *Manwaring*, Bunb. 2[illegible]9.

7. And the tenant having been distrained upon by the ground landlord for several years' ground-rent, it was held, that he could only set off such part of it as accrued during the same period. *Ibid.*

8. It is no defence in this action, that the plaintiff has brought an ejectment for the same premises, laying the demise on the day on which the supposed tenancy commenced. *Ibid.*

S. P. Anon. cited Cowper, 246, and denied by Buller, J. 1 T. R. 386.

And ruled that it would be otherwise after a *recovery* in ejectment. *Birch* v. *Wright*, 1 T. R. 378, 88.

And see Vid. Ent. 143.

9. Such a circumstance would, however, be a ground of special application to the court. *Cobb* v. *Carpenter*, *ubi supra.*

And see F. N. B. 120 H.

10. The tenant cannot set up a want of title in the plaintiff, under whom he came into possession. *Morgan* v. *Ambrose*, Esp. D. N. P. 31. Wilmot, J. Monmouth, 1756.

S. C. Peake's Evidence, 242.

11. It is no defence that the plaintiff was himself merely tenant at will. *Atkinson* v. *Pierpoint*, Esp. N. P. D. 30. Dennison, J. Lincoln, 1775.

12. But he may shew that the plaintiff's interest has expired. *Morgan* v. *Ambrose*, Esp. D. N. P. 31.

And see Co. Litt. 356, a.

B. Nature of occupation.

13. A. lets to B. who underlets to C. and D.; A. gives notice to quit to C. and D.: C. quits accordingly, and the premises occupied by him, lie vacant for a year, after which they are re-let by B.; B. is not liable to A. for the rent of the unoccupied premises. *Burn* v. *Phelps*, 1 Stark. 94. Ellenborough, C. J. 1815.

14. And *semble*, that an eviction might have been pleaded in respect of all the premises demised to B. *Ibid.*

15. *Semble*, that a party entering under a verbal agreement for a lease to commence in futuro, is a strict tenant at will, until the period at which the intended lease begins to run. *De Medina* v. *Polson*, Holt, 47. Gibbs, C. J. 1815.

16. A landlord evicts the tenant from parcel of premises let at an entire rent. The latter by quitting the residue is entirely discharged. *Smith* v. *Raleigh*, 2 Campb. 515. Ellenborough, C. J. 1814.

17. But if he continue in possession he is liable upon a *quantum meruit.* *Stokes* v. *Cooper*, 3 Campb. 514, n. Dallas, J. Worcester, 1814.

18. *Semble*, that an action lies for the rent of a synagogue, there being no written law prohibiting such establishments. *Israel and others* v. *Simmons*, 2 Stark. 356. Abbott, C. J. 1818.

19. Where premises are let for the express purpose of prostitution, no action can be maintained. *Girardy* v. *Richardson*, 1 Esp. 13. Kenyon, C. J. 1793.

S. P. *Howard* v. *Hodges*, Selw. 67; Acc. Dig. 18. 1. 35. 2.

Sed vide *Lloyd* v. *Johnson*, 1 Bos. & Pul. 340.

C. Evidence.

20. Declaration for the use of premises, *situate* in the parish of A. in the county of B.; there being no parish of that name in the county; the misdescription is fatal. *Wilson* v. *Clark*, 1 Esp. 273. Kenyon, C. J. 1795.

21. S. P. *Guest* v. *Caumont*, 3 Campb. 235. Ellenborough, C. J. 1812.

And see post, Variance, C.

22. Where premises are held under an unstamped agreement, the landlord cannot enter into parol evidence of the demise. *Brewer* v. *Palmer*, 3 Esp. 213. Eldon, C. J. 1800.

Acc. *Rex* v. *Inhabitants of St. Paul's, Bedford*, 6 T. R. 452.

Sed vide *Alves* v. *Hodgson*, 7 T. R. 241.

And see *White* v. *Wilson*, 2 Bos. & Pul. 118; *Hodges* v. *Drakeford*, 1 N. R. 272, 3.

23. Assumpsit for use and occupation, will lie where there is an agreement under seal, if such agreement contain no words of present demise. *Elliott, executor of Thomson*, v. *Rogers*, 4 Esp. 59. Kenyon, C. J. Maidstone, 1801.

S. P. *Bannister* v. *Usborne*, Peake's Evid. 242.

USURY.

A. WHAT SHALL BE.

(a) *Upon a loan.*

(b) *Upon forbearance.*

B. SECURITIES, WHERE VOID.

(a) *As between the original parties.*

(b) *In third hands, before the late statute.*

C. PLEADINGS.

D. EVIDENCE.

A. WHAT SHALL BE.

(See the distinction between Usury and Interest, APPENDIX II.)

A. (a) *Upon a loan.*

1. If the lender oblige the borrower to take stock at a rate exceeding the market price, it is usury. *Doe* d. *Davidson* v. *Barnard, assignee of Timmings,* 1 Esp. 11. Kenyon, C. J. 1793.

2. A country banker upon discounting a bill, makes a deduction for the whole time which the bill has to run, *and without inquiring in what shape the purchaser wishes to receive the balance*, gives him a draft on London at *three days sight* for the amount. This is usury. *Matthews, qui tam*, v. *Griffiths and others,* Peake, 200. Kenyon, C. J. 1793.

3. It is usurious to substitute goods for money, at an excessive value in discounting a bill. *Pratt* v. *Willey,* 1 Esp. 40. Kenyon, C. J. 1793.

4. *Secus*, where goods are taken at an ascertained value. *Ibid.*

5. But where it appears that the defendant applied to the plaintiff to discount the bill, who refused to do so, unless the former would take a picture at 150l. it lies upon the plaintiff to shew that the defendant might have sold it for that sum, not that it would be a fair price to a willing purchaser. *Davis* v. *Hardacre,* 2 Campb. 375. Ellenborough, C. J. 1810.

6. Where, however, the plaintiff refused to discount a bill unless the indorser would take part in goods at a given price, and the latter readily acceded to the proposal, saying, that he thought he could make a profit of them, it would be presumed that the goods were charged beneath their real value. *Coombe* v. *Miles,* 2 Campb. 553. Ellenborough, C. J. 1811.

7. An exorbitant discount paid to an acceptor to induce him to pay the bill before it is due, is not usurious. *Berkley (or Barclay)* v. *Walmsley,* 5 Esp. 11. Ellenborough, C. J. 1803.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 4 East, 55.

Cont. Pothier, Traité de l'Usure, part 2. sect. 5. num. 128.

And see ex parte Aynsworth, 4 Ves. 678; *Hutchinson* v. *Piper,* 4 Taunt. 810; post, pl. 11, 15, 20.

8. A. having a vested interest in stock which he cannot transfer till a future day, sells his interest in the principal and accruing dividends, to B. at a rate much below the current price. This bargain is not usurious. *Pike* v. *Ledwell* v. *Ann Monprivatt,* 5 Esp. 164. Ellenborough, C. J. 1804.

9. Where a factor advances the money for the purchase of goods, if besides interest for his advances, he stipulates for a higher commission upon his purchases than would have been charged had he not furnished the money, the transaction is usurious. *Harris and another* v. *Boston,* 2 Campb. 348. Ellenborough, C. J. 1809.

And see *Palmer* v. *Baker,* 1 M. & S. 56.

10. A charge of 7s. 6d. per cent. for commission by a discounter of bills, who is put to little trouble and no expense, is usurious. *Brooke, qui tam,* v. *Middleton,* 1 Campb. 445. Ellenborough, C. J. 1808.

And the court of K. B. refused a rule for a new trial, moved for on the ground of a supposed misdirection to the jury. *Ibid.*

S. C. 10 East, 268, not S. P.

Vide tamen, *Winch* v. *Fenn,* Bac. Abr. Usury, C.

11. But a commission charged by an acceptor, where no advance is in contemplation, is not usurious. *Masterman and others* v. *Cowrie,* 3 Campb. 488. Ellenborough, C. J. 1813.

And see ante, pl. 7; post, pl. 15, 20.

12. In a subsequent action upon the transaction stated in *Brooke* v. *Middleton*, (supra, pl. 10,) where the forbearance was laid to be from *the* 21*st* April, it appeared, that one of the notes was a cheque which was void from not being stamped, but was in fact paid by the drawee on *the* 22*d*. Held, that though this cheque was accepted by the borrower and his bankers as cash, it was a mere nullity, that the loan did not take place till the 22d, and that the variance was clearly fatal. *Barrodaile, qui tam*, v. *Middleton*, 2 Campb. 53. Ellenborough, C. J. 1809.

And see *Hutchinson* v. *Piper*, 4 Taunt. 810.

13. Where money is advanced upon the security of Omnium, which is to be taken back by the borrower at a fixed advance of price at a day certain, and the difference in the price exceeds the rate of five per cent. for the period, during which the borrower is to retain the money, the transaction is usurious. *Smedley, qui tam*, v. *Roberts and another*, 2 Campb. 607. Ellenborough, C. J. 1811.

14. Held, that the conveyance of property at 1200l. accompanied with a covenant to re-purchase at 1400l. within 15 months, was not necessarily usurious, but that it was a question for the jury, whether a loan or a sale were the real object of the parties. *Doe, on demise of Metcalf*, v. *Brown and others*, Holt, 295. Gibbs, C. J. 1816.

A. (b) *Upon forbearance.*

15. A person accommodating another with his acceptance, cannot, *upon the renewal of such bill*, make a charge for commission upon the first acceptance. He can only take interest for the time during which the debt will, by such renewal, be forborne. *Kent* v. *Lowen*, 1 Campb. 177. Ellenborough, C. J. 1808.

Ante, A. (a) 11.

B. Securities, where void.

B. (a) *As between the original parties.*

16. A lessee assigns his term for 900l. *with power of redemption*, and agrees to rent the premises of the assignee at 70l. The assignment is void. *Doe* d. *Titford, assignee of Trustram*, v. *Chambers, gent. one, &c.* 4 Campb. 1. Ellenborough, C. J. 1814.

17. A note was given by B. for the amount of money advanced by A. and usurious interest was reserved by a separate instrument. B. being taken in execution on the note, C. gave a new security to A. for the amount. Held, that the consideration of the last security could not be impeached. *Turner* v. *Hulme*, 4 Esp. 11. Kenyon, C. J. 1801.

18. If a party against whom an award is made, in consideration of forbearance, gives a bill for a larger sum than that which the arbitrator intended to have awarded, the bill is valid. *Barnett* v. *Stone*, 3 Esp. 209. Kenyon, C. J. 1800.

19. If a bill is drawn for the purpose of effecting an usurious contract between the acceptor and a stranger who undertakes to discount it, the bill is void, though the drawer be not privy to such contract. *Young and another* v. *Wright*, 1 Campb. 141. Ellenborough, C. J. 1807.

20. A. for an extravagant commission, undertakes to negotiate a bill, indorsed in blank by the payee, and at the request of the party with whom he discounts it, indorses the bill: this is not usury, unless it were originally agreed between A. and the payee, that the former should be a party to the instrument. *Jones* v. *Davison*, Holt, 256. Gibbs, C. J. 1816.

And, *quære*, whether the transaction would have been strictly usurious, even had the indorsement of A. formed part of the original arrangement, there being neither loan nor forbearance from him.

21. If upon the giving of a bill of exchange to secure previous advances, excessive interest is charged upon the advances by a mistake of calculation, the bill is available for the sum which is really due. *Glasfurd* v. *Laing and others*, 1 Campb. 149. Mansfield, C. J. 1807.

And see *Barnes* v. *Hedley*, 2 Taunt. 184.

22. Held, that if money be lent upon an usurious contract, a promise to pay the principal with legal interest, on can-

celling the securities and remitting the usurious interest, is void. *Barnes and others, executors of Webb*, v. *Headley and another*, 1 Campb. 157, 190. Chambre, J. 1807.

And see *Pickering* v. *Banks*, Forrest, 72.

Upon a second issue out of chancery, Mansfield, C. J. and afterwards the court of C. P. held the promise good. 2 Taunt. 184.

23. But a fresh bill given for the amount of the principal and interest upon a usurious contract is not available even for the principal and simple interest. *Preston* v. *Jackson*, 2 Stark. 237. Holroyd, J. 1817.

24. Where a bond, given for the performance of an usurious contract, is cancelled, a fresh bond taken for the principal and interest, after deducting the payments illegally made on the former contract, is valid. *Wright* v. *Wheeler*, 1 Campb. 165, n. Lawrence, J. Worcester, 1799.

25. Where a bill is given to secure an usurious agreement respecting a valid subsisting debt, the security is void, but the original debt remains. *Phillips* v. *Cockayne*, 3 Campb. 119. Ellenborough, C. J. 1811.

And see *Ferrall* v. *Shaen*, 1 Saund. 290; *Gray* v. *Fowler*, 1 H. Bla. 465.

B. (b) *In third hands.*

26. A bill good in its inception, is not avoided in the hands of a *bonâ fide* indorsee, by an intermediate usurious transaction. *Daniel* v. *Cartony*, 1 Esp. 274. Kenyon, C. J. 1795.

N. And now by 58 Geo. III. cap. 93. it is enacted "that no bill of exchange or promissory note, that shall be made or drawn after the passing of this act, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, *actual notice* that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract."

27. A valid bill is indorsed by A. the payee, upon an usurious agreement to B. who indorses for a good consideration to C. C. indorses to B.'s assignees in payment of a debt due to the estate. The assignees have a good title under C. *Parr* v. *Eliason et alt.* 3 Esp. 210. Kenyon, C. J. 1800.

And the court of K. B. discharged a rule for setting aside a nonsuit in trover. *Ibid.* and 1 East, 92.

28. But it was afterwards determined that a plaintiff, who must make title through a usurious indorsement, could not recover. *Lowes and others* v. *Mazarredo and others*, 1 Stark. 385. Ellenborough, C. J. 1816.

And the court made absolute a rule for setting aside a nominal verdict for the plaintiff. *Ibid.*

29. A.'s promissory note is discounted at an usurious rate by B. who indorses to C. without notice of the usury. A. gives his bond to C. for the amount. The bond is valid. *Cuthbert, et alt.* v. *Haley*, 3 Esp. 22. Kenyon, C. J. 1799.

And the court discharged a rule for entering a nonsuit. *Ibid.* and 8 T. R. 390.

S. P. *Ellis* v. *Warnes*, Fra. Moore, 752; S. C. Cro. Jac. 32; S. C. Yelv. 47; and see *Robinson* v. *May*, Cro. El. 588.

30. The acceptor of a bill drawn in pursuance of an usurious contract, accepts a second bill for the purpose of raising money to take up the former. The second bill is indorsed by a *bonâ fide* indorsee at the legal rate of interest. The second bill is not affected by the usury which attended the formation of the first. *Dagnall* v. *Wylie and another*, 2 Campb. 33. Ellenborough, C. J. 1809.

31. Accommodation bills drawn and accepted upon an understanding that a broker shall be paid 10s. per cent. for raising money upon them, are not void in the hands of a *bonâ fide* indorsee, who advances the money at legal discount; though the broker is punishable by 12 Ann, cap. 16. s. 2. for taking the exorbitant commission. *Ibid.*

And the court refused a rule nisi to set aside a verdict for the plaintiff. *Ibid.* and 11 East, 43.

And see ante, STATUTES, pl. 62.

32. Where A. agrees to advance

money to B. upon a usurious contract, which is to be effected by B.'s procuring C. to draw a bill to be accepted by B. it is immaterial that C. was originally unacquainted with the corrupt agreement to which the bill owed its formation, and he may avail himself of the evidence of B. the acceptor, to prove the usurious bargain, in an action brought by an innocent indorsee. *Ackland* v. *Pearce*, 2 Campb. 599. Le Blanc, J. 1811.

C. Pleadings.

33. The day on which money is averred to be advanced upon an usurious contract, is material, though laid under a videlicet. *Harris, qui tam*, v. *Hudson*, 4 Esp. 152. Ellenborough, C. J. 1802.

34. A. gives a note to B. as a collateral security for the debt of C. When the note becomes due, B. for a usurious consideration extends the time of payment of the note. This may be laid as a forbearance of money *lent by B. to A. Manners, qui tam*, v. *Postan*, 4 Esp. 240. Alvanley, C. J. 1803.

And the court of C. P. discharged a rule for entering a nonsuit. *Ibid.* and 3 Bos. & Pul. 343.

And see *Wade* v. *Wilson*, 1 East, 195.

35. Money advanced in the shape of bankers' cash notes does not constitute a loan within the statute, 12 Ann, st. 2. cap. 16. until money is actually received upon such notes, unless the parties previously agree to consider the notes as cash. Therefore where the declaration stated a forbearance of money from the 20th of April, and it appeared that cash notes were sent off by the post on that day, but that they were not received by the borrower until the 21st, it was held to be a fatal variance. *Brooke, qui tam*, v. *Middleton*, 1 Camph. 445. Ellenborough, C. J. 1808.

D. Evidence.

36. In an action for usury, an admission by the borrower is not evidence for the defendant, the lender. *Maugham* v. *Walker*, Peake, 163. Kenyon, C. J. 1792.

37. But if the borrower's testimony be material, and cannot be obtained on account of his being abroad, the court will grant a new trial. *Ibid.*

S. C., and probably S. P., alluded to, 5 T. R. 98.

38. The plaintiff may produce the writ to shew that the action was commenced within the year, as well after as before the objection is taken. *Ibid.*

39. In an action by indorsee against acceptor, the drawer on being released by the defendant is a good witness to prove that he indorsed the bill upon a usurious contract with the plaintiff. *Rich and another* v. *Topping*, Peake, 224, and 1 Esp. 177. Kenyon, C. J. 1794.

40. S. P. ruled in *Brard* v. *Ackerman*, 5 Esp. 119. Ellenborough, C. J. 1804.

Acc. *Jordaine* v. *Lashbrook*, 7 T. R. 601, over-ruling *Walton* v. *Shelley*, 1 T. R. 296.

41. In a qui tam action, the borrower may prove the whole transaction, whether the principal be paid or not. *Smith, qui tam*, v. *Prager*, 2 Esp. 486. Kenyon, C. J. 1796.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 7 T. R. 60.

42. Where usury is stated to have been committed in discounting the bill upon which the action is brought, and another bill, in one undivided transaction, no parol evidence is admissible as to the contents of the latter, unless notice has been given to produce it. *Hattam* v. *Withers*, 1 Esp. 259. Kenyon, C. J. 1795.

43. The taking of one sum for the discount of two bills, will not support a charge of usury, unless both bills be given in evidence, or it can be distinguished how much was paid for the discount of each particular bill. *Ibid.*

44. In an action by the indorsee of a note against the maker, letters written to the latter by the payee negotiating a usurious bargain, are admissible, if shewn by the postmark, or otherwise, to have been contemporaneous with the making of the note. *Kent* v. *Lowen*, 1 Campb. 177. Ellenborough, C. J. and K. B. 1808.

43. S. P. *Walsh* v. *Stockdale*, Chitty on Bills, 526. Abbott, J. 1818.

Sed vide ante, LIBEL, pl. 59; and see ante, INSURANCE, pl. 236.

VARIANCE.

(And see ante, PLEADING, B. (b).)

A. WHAT SHALL BE DEEMED MATTER OF ALLEGATION REQUIRING SUBSTANTIAL, AND WHAT MATTER OF DESCRIPTION REQUIRING STRICT PROOF.

B. MATTER OF ALLEGATION, WHERE SUFFICIENTLY PROVED.

C. MATTER OF DESCRIPTION, WHERE SUFFICIENTLY PROVED.

D. VARIANCE, HOW TAKEN ADVANTAGE OF.

A. WHAT SHALL BE DEEMED MATTER OF ALLEGATION REQUIRING SUBSTANTIAL, AND WHAT MATTER OF DESCRIPTION REQUIRING STRICT PROOF.

1. An averment that an issue was joined is supported by the production of an information containing two counts, upon *each* of which issue was separately taken. *Rex* v. *Jones*, Peake, 38. Kenyon, C. J. 1791.

2. In debt for using a trade without having served an apprenticeship, the whole time laid in the declaration need not be proved, provided it be averred that the defendant forfeited 40s. for every month. *Powell, qui tam,* v. *Farmer*, Peake, 57. Kenyon, C. J. 1791.

3. Indictment under 17 Geo. III. cap. 26. s. 7. for taking a particular sum exceeding 10s. per cent. as brokerage on an annuity. The sum included a demand for preparing the deeds, &c. Held to be no variance. *Rex* v. *Gilham*, 1 Esp. 285. Kenyon, C. J. 1795.

And the court discharged a rule for a new trial, on the ground that the precise quantum of excess was immaterial. 6 T. R. 265.

4. Assignees under a joint commission against A. and B. suing for the debt of A., may describe themselves as the assignees of A. only. *Harvey and others, assignees of Harvey*, v. *Morgan and another*, 2 Stark. 17. Ellenborough, C. J. 1816.

5. A plaintiff may shew that he was the intended payee of a bill which purports to be payable to a person of a different name. *Willis* v. *Barrett*, 2 Stark. 29. Ellenborough, C. J. 1817.

6. So upon *non est factum* pleaded to a bottomry bond, it is no defence that the obligees are described therein as "the Widow Moller and Son," the widow having died before the execution of the bond, and the business at the time being carried on by her sons, the now plaintiffs; it is enough to prove that they are the persons meant by the description in the bond. *J. Moller and T. Moller* v. *Lambert*, 2 Campb. 548. Ellenborough, C. J. 1810.

7. In an action against the *acceptor* of a bill signed A. and Co., it may be averred to have been drawn by "certain persons, using the style of A. and Co.," though A. has no partner. *Bass* v. *Clive*, 4 Campb. 78. Ellenborough, C. J. 1814.

And the court set aside a nonsuit on the variance. *Ibid.* and 2 M. & S. 282.

And see *Jenys* v. *Fawler*, 2 Stra. 946.

8. And the declaration may proceed to state that the said persons so using, &c." indorsed the bill. *Shaw and another* v. *Farquhar*, Abbott, C. J. Westm. 1819.

And the court refused a rule for a new trial. B. R. T. T. 1819.

9. A writ directed to the sheriff of Middlesex generally, may be stated to have been directed to A. and B. sheriff of Middlesex. *Batchellor and another* v. *Salmon*, 2 Campb. 525. Ellenborough, C. J. 1810.

And the court refused a rule for a new trial. *Ibid.*

10. *Trover* against the sheriff for a levy under a *fieri facias* after an act of bankruptcy, the amount of which had been paid over upon an indemnity, may, in a declaration on the indemnity, be described as "an action prosecuted for the recovery of the said sum of money." *Ibid.*

11. A general averment that a bill was accepted by the defendants, is sup-

ported by evidence of an acceptance by their authorized agent as follows: "for A. B. and Co." J. S." *Heys* v. *Heseltine and another*, 2 Campb. 604. Ellenborough, C. J. 1811.

12. A declaration for penalties under the lottery insurance act, need not state that a premium was paid to the defendant. *Phillips, qui tam*, v. *Mendez da Costa*, 1 Esp. 59. Kenyon, C. J. 1793.

13. Plaintiff declares for the use and occupation of premises *situate in the parish of A.* there being no such parish; the variance is fatal. *Wilson* v. *Clark*, 1 Esp. 273. Kenyon, C. J. 1795.

Sed vide *Frith* v. *Gray*, 4 T. R. 561, n.; *Goodtitle* v. *Walter*, 4 Taunt. 671.

14. An averment of the issuing of a latitat against "Francis J., by the name of John J., is not supported by evidence of a latitat against John J., although the bond was signed by the principal, "Francis J. arrested by the name of John J.," and the debt and the identity of the party can be proved. *Scandover and others* v. *Warne*, 2 Campb. 270. Ellenborough, C. J. 1809.

15. Issue upon a prescription for a several fishery, in four places, in a navigable river. It appeared that the right extended to two of the places only, in one of which the trespasses had been committed. It was ruled that the trespasses not having been committed in the excepted places, the variance between the prescription and the evidence was immaterial. *Rogers and another* v. *Allen*, 1 Campb. 313. Heath, J. Chelmsford, 1808.

But the court of K. B. granted a new trial. *Ibid.*

See ante, Custom, pl. 2; Pleading, pl. 52; 1 Wms. Saund. 268, note 1.

16. In an action for words spoken of an attorney, with reference to his conduct in the management of a former cause, the proceedings in that cause must be strictly proved. *Parry, gent. one, &c.* v. *Collis*, 1 Esp. 399. Kenyon, C. J. 1795.

17. Plaintiff declares for a penalty for a fraud in the measure of coals purchased by A. and B. The contract of sale appears to have been made between the defendant and A., B., and C., who agreed to divide the quantity between them. The variance in the description of the contract is fatal, though a separate delivery was made to A. and B. of their share. *Parish, qui tam*, v. *Burwood et alt.* 5 Esp. 33. Ellenborough, C. J. 1804.

18. S. P. ruled in *Everett, qui tam*, v. *Tindall*, 5 Esp. 169. Ellenborough, C. J. 1804.

And see post, Vendor and purchaser, A. (a) 1, 2; 47 Geo. III. s. 2. cap. 68.

19. Plaintiff declares on a bill *made* on the 3d February, though the bill appears to *bear date* on a different day, it need not be shewn to have been made on the third. *Coxon* v. *Lyon*, 2 Campb. 307, n. Thompson, B. York, 1810.

And see infra, C.

20. An allegation of a retainer "at a certain salary, to wit, 250l. per annum," can be supported only by proof of contract for a specific annual salary. *Preston* v. *Butcher*, 1 Stark. 3. Ellenborough, C. J. 1814.

21. Evidence of an agreement to take on board 500 quarters of wheat, will not support a count which set out an agreement to take a full cargo; though this quantity in fact amount to a full cargo. *Harrison* v. *Wilson*, 2 Esp. 708. Kenyon, C. J. 1798.

22. Nor will such evidence support a general count for the use and hire of a ship. *Ibid.*

B. Matter of allegation, where sufficiently proved.

(And see ante, Usury, pl. 34.)

23. Where, by an agreement for a purchase, an appraisement was appointed to be made on a day certain, which was afterwards postponed by consent, a declaration on the original agreement, without noticing the alteration, is good. *Thresh* v. *Rake*, 1 Esp. 53. Kenyon, C. J. 1793.

24. In an action on a bond given to indemnify B. and C. against any advances made by them to A., it is sufficient to prove that money was advanced by the house of B., C., and D., in which D. is merely a nominal partner. *Robert Harrison, surviving partner of Thomas Harrison*, v. *Fitzhenry*, 3 Esp. 238. Le Blanc, J. 1800.

25. An allegation in the memorial of an annuity, that the *grantee paid* the purchase money to the grantor, is supported by evidence of the depositing of the amount by the grantee at his banker's in the name of his attorney, to wait the performance of a condition on the part of the grantee, and it's being subsequently *paid over by the attorney*. *Coare* v. *Giblet*, 4 Esp. 231. Ellenborough, C. J. 1803.

S. C. not S. P. 3 East, 461.

N. It does not appear from the report whether the payment ought to be considered as made on the day on which the money was deposited with the banker, or on that on which it was paid over to the grantor.

26. *Semble*, that an averment that J. S. "was one of the *meters* duly *appointed* to measure coals from ships in the Thames," is supported by evidence that he was *appointed deputy* coal-meter by the principal coal-meters, and *approved* by the city. *Davey* v. *Lowe*, 5 Esp. 70. Ellenborough, C. J. 1803.

27. A bill was stated in the declaration to have been indorsed *before* it became due; it appeared in evidence to have been indorsed *after* it was due. Held, that the variance was immaterial. *Young and another* v. *Wright*, 1 Campb. 139. Ellenborough, C. J. 1807.

And see *Russell* v. *Langstaffe*. Dougl. 497, 515.

28. A. files a bill in chancery against B., C., and D. In an indictment against B. for perjury in his answer, the bill is described as having been filed against B. and another; but the perjury is assigned in a part of the answer which is material between A. and B. This is a substantial statement of the proceedings within the meaning of 23 Geo. II. cap. 11. s. 1; and it would not have been a material variance if it had been alleged that the bill was filed against B. only. *Rex* v. *William Benson*, 2 Campb. 508. Ellenborough, C. J. 1810.

29. An allegation, "that there has immemorially been a vestry, composed of a *certain number* of select persons," can be supported only by proof that the vestry consisted of a definite number. *Berry and another* v. *Banner and another*, Peake, 156. Kenyon, C. J. 1792.

30. So where it is averred that the vestry consisted of a *certain select number* of persons, *comme semble*. *Ibid.*

31. *Semble*, that an averment in a declaration for a malicious arrest, that the former suit is at an end, is not supported by producing a judge's order to discontinue on payment of costs, and shewing that the costs have been paid accordingly. *Kirk* v. *French*, 1 Esp. 80. Kenyon, C. J. 1794.

Acc. *Goddard* v. *Smith*, 6 Mod. 261; S. C. Salk. 21; 456; S. C. Holt, 497.

32. If a party declare *in tort* as the proprietor *and editor* of a newspaper, which appears in evidence to be edited by a servant, under the inspection and revision of the plaintiff, *semble*, that the averment is entire, and that the plaintiff cannot recover as proprietor *pro tanto*. *Heriot* v. *Stuart*, 1 Esp. 437. Kenyon, C. J. and K. B. E. 1796.

33. A count for slander, where the obnoxious words contain distinct charges, is supported by proof of words conveying any one of such charges. *Flower* v. *Pedley*, 2 Esp. 491. Eyre, C. J. 1796.

34. But if the unproved words affect and modify those which are proved, the variance is fatal. *Ibid.*

35. An averment that A. has received 500l. is not supported by evidence of the transfer of 500l. *stock* into his name. *Jones* v. *Brindley*, 3 Esp. 205. Kenyon, C. J. 1800.

S. P. *Nightingall* v. *Devisme*, 5 Burr. 2589; S. C. 2 Bla. 684.

36. Evidence that the defendant made a statement of facts amounting to a *tortious conversion* only, upon which a magistrate issues a warrant in the wo[illegible] of the information, will not suppo[illegible] count for imputing the crime of felony. *Tempest* v. *Chambers*, 1 Stark. 67. Ellenborough, C. J. 1815.

37. So, though the magistrate cause the plaintiff to be apprehended on suspicion of felony. *Leigh* v. *Webb*, 3 Esp. 165. Eldon, C. J. 1800.

38. And *semble*, that no action can be maintained in such case. *Ibid.*

39. A surviving partner may declare without naming the deceased. But if goods sold by two partners be *described* as the goods *of* the survivor, the variance is fatal. *Ditchburn* v. *Spracklin and others*, 5 [illegible]p. 31. Ellenborough, C. J. 1803.

And see *Greenway* v. *Horneblow*, Hardres, 221; ante, ACTION, pl. 33.

40. Where the defendant justifies under a *peace officer*, and the person appears to be merely a patrol employed by the parish, and not a constable, the evidence does not support the plea. *Cliffe* v. *Littlemore*, 5 Esp. 39. Ellenborough, C. J. 1803.

41. An averment that A. was on a particular day *indebted* to B. *for goods sold and delivered*, is not supported by evidence of the delivery of goods upon a contract for payment in bills which would not be due on that day. *White* v. *Jones, esq. Marshal of the King's Bench*, 5 Esp. 161. Ellenborough, C. J. 1804.

42. *Secus*, if it appear that the original agreement was for ready money, and that the payment in bills was an accommodation *afterwards* extended by the vendor. *Ibid.*

And see ante, AGREEMENT, A. (a) 1; ASSUMPSIT, A. (a) 1.

43. If the plaintiff declare as indorsee of a promissory note drawn by the defendant, payable to the order of A. and avers that A. indorsed it, *his own proper hand being thereunto subscribed*, and the whole note, when produced, appears to be indorsed by B. *per procuration* for A. the variance is fatal, as the indorsement is a material and necessary averment, and if stated according to the fact would have afforded the defendant the opportunity of shewing that no such authority was given, which would have been an answer to the action. *Levy* v. *Wilson*, 5 Esp. 180. Ellenborough, C. J. 1804.

44. But *semble*, that proof that a bill was indorsed by an unauthorized agent *in the name of the principal*, is sufficient to support an averment of an indorsement made by the principal, *his own* proper hand being thereunto subscribed; and that at any rate the defendant cannot be allowed to take the objection after a promise to pay, made with the full knowledge of this circumstance. *Helmsley* v. *Loader*, 2 Campb. 450. Ellenborough, C. J. 1810.

45. Evidence of the improper stowing of the defendant's anchor, whereby it broke into another vessel and damaged the plaintiff's goods, will not support a count charging the injury on the unskilful steerage of the defendant's ship. *Hullman* v. *Bennett*, 5 Esp. 226. Ellenborough, C. J. 1805.

And the court refused a rule for a new trial. *Ibid.* 228.

46. An averment in an information that "an order was made for the landing of goods on a quay or wharf," is not supported by evidence of an order to deliver "at the king's warehouse," though it appears in evidence that the warehouse stands on the quay. *Rex* v. *Cassano*, 5 Esp. 231. Ellenborough, C. J. 1805.

47. Where an indictment charges the defendant with obtaining, by false pretences, a sum of money, the property of A. and it appears that the money belonged to A.'s servant, who was afterwards reimbursed by his master, the variance is fatal. *Rex* v. *Douglass*, 1 Campb. 213. Ellenborough, C. J. 1808.

48. But such an averment is supported by shewing that the servant had in his hands at the time an equal sum belonging to his master. *Ibid.*

49. Declaration charges the defendant with committing a nuisance to the injury of the plaintiff's reversionary interest in premises, in the occupation *of their tenants*. The plaintiffs are seized in trust for the parish of B.; the premises are occupied by paupers, and by a parish officer appointed to take care of them. The averment of tenancy is not proved. *Martin and another* v. *Goble*, 1 Campb. 320. Macdonald, C. B. Horsham, 1808.

50. The omission of the place of payment contained in the body of a promissory note, is not cured by an averment that the note was *duly* presented. *Roche* v. *Campbell*, 3 Campb. 247. Ellenborough, C. J. 1812.

51. An outgoing tenant cannot declare for *goods* sold, upon an executed agreement to take the fixtures. *Nutt* v. *Butler*, 5 Esp. 176. Ellenborough, C. J. 1804.

52. In assumpsit against schoolmaster for delivering fireworks to plaintiff's son, his scholar, and suffering him to retain them, contrary to defendant's duty and undertaking, with special damage, *delivery* must be proved as averred. *King* v. *Ford*, 1 Stark. 421. Ellenborough, C. J. 1816.

53. Where two lots are sold under an inclosure act, a declaration upon a sale of "divers, to wit, two lots, &c." is bad. The agreements are separate both in law and fact, and cannot be stated as one contract. *James and another* v. *Shore*, 1 Stark. 428. Ellenborough, C. J. 1816.

54. And if the commissioners have resold under the conditions, they cannot recover upon the general count, as for a sale to defendant. *Ibid.*

55. An allegation of "a charge of felony," is supported by proof of a charge *upon suspicion*. *Davis* v. *Noak*, 1 Stark. 377. Ellenborough, C. J. 1816.

And the court discharged a rule for a new trial. *Ibid.*

56. In an action against A. for the negligence of his waggoner, an averment that the waggoner was employed by A. is supported by evidence of his being employed by B. who horses a different part of the same line of road. *Waland* v. *Elkins*, 1 Stark. 272. Gibbs, C. J. 1816.

And see ante, Partner, pl. 6.

57. An allegation that the plaintiff gave bail to the sheriff for his appearance at the return of the writ, is not supported by evidence that he paid the debt, and 10l. for the costs, into the hands of the sheriff. He is, therefore, precluded from recovering for the consequential damage. *Bristow* v. *Haywood*, 4 Campb. 213. Ellenborough, C. J. 1815.

58. Declaration against an attorney for suffering A. to be superseded, averred that A. was justly indebted to the plaintiff. It was proved that A. was a married woman. The variance was held fatal. *Lee* v. *Ayrton, one, &c.* Peake, 119. Kenyon, C. J. 1792.

59. In debt, *qui tam*, for setting a person to work in the trade of a sawyer who has not served an apprenticeship, if that business appears to have been merely auxiliary to the trade actually carried on, the variance is fatal. *Spencer, qui tam*, v. *Mann and others*, 5 Esp. 110. Ellenborough, C. J. 1804.

60. But *semble*, that a mere misdescription of the trade of the party who sets the unqualified person to work, is immaterial. *Ibid.*

And see *Beach* v. *Turner*, 4 Burr. 2449.

C. Matter of description, where sufficiently proved.

(And see post, Venue, pl. 2; Waste, pl. 5.)

61. Where, in a declaration for a false return, the plaintiff sets out a judgment to recover *two* distinct sums, and the record when produced appears to be a judgment for *three* distinct sums, *semble*, that the omission is no ground of nonsuit. *Phillips* v. *Eamer et alt. sheriffs of London*, 1 Esp. 355. Kenyon, C. J. 1795.

62. The omission of a party's addition, (the younger,) is not a fatal misrecital of a record, where it gives rise to no ambiguity. *Amey* v. *Long*, 1 Campb. 15, and 6 Esp. 116. Ellenborough, C. J. 1807.

63. If a declaration describe a writ as having issued against "M. B." and it appear to have been issued against "M. B. spinster," the variance is immaterial. *Secus*, if the writ be against "M. B." and the declaration describe it as having issued against "M. B. spinster." *Brown* v. *Jacobs*, 2 Esp. 726, 7. Kenyon, C. J. 1799.

64. An averment that it was ordered by a bye-law that there should be a court *consisting of* certain officers, is supported by evidence of a law, enacting that these officers should *be sufficient* to constitute the court. *Rex* v. *Campbell*, 1 Campb. 91. Ellenborough, C. J. 1807, and K. B. 1808.

65. In an action for not accepting the assignment of a shop, and taking goods at a valuation, the declaration stated that the plaintiff was possessed of premises *for the remainder of a certain term of years*, which he agreed to assign to the defendant. It appeared that the plaintiff was merely lessee from year to year, with a promise of a term for 14 years. Held, that the legal estate of the plaintiff was sufficient to support the averment in the declaration. *Botting* v. *Martin*, 1 Campb. 317. Ellenborough, C. J. 1808.

66. In an action brought by *Elizabeth* H. the record of a judgment in the mayor's court was produced, in which the now defendant was garnishee, and *Eliza* H. was defendant. But it appearing that the plaintiff's attorney, in

the present suit, had called her *Eliza* H. It was held to be no variance. *Huxham* v. *Smith*, 2 Camph. 21. Ellenborough, C. J. 1809.

67. In an action by C. and D. as assignees of A. a notice entitled "in an action between C. and D., assignees of A. and B.," &c. is inoperative. *Harvey* v. *Morgan*, *ubi supra*, pl. 4.

And the court refused a rule for a new trial. 2 Stark. 19.

68. The words "accepted on myself, payable everywhere," inserted in the margin of a promissory note, payable seven days after sight, are not to be declared upon as part of the original instrument, though contemporaneous in point of fact. *Spitgerber* v. *Kohn*, 1 Stark. 125. Ellenborough, C. J. 1815.

69. Declaration stated that the defendant had preferred an indictment against the plaintiff, charging her with having feloniously stolen three promissory notes. The indictment, when produced, was found to charge the plaintiff with having stolen the notes *in a dwelling house*. It was urged that the indictment proved the allegation and more, and that upon an indictment so framed, the plaintiff might have been convicted of the simple grand larceny. The count was held bad. Graham, B. Bristol Summer Assizes, 1819.

70. The plea of *not guilty* to an information in the exchequer for receiving run goods, *puts in issue* only the facts which form the gist of the action; and where an indictment for perjury committed at the trial of the information, avers that issue was joined upon facts, some of which were merely laid as inducement, though necessary to be proved at the trial, the variance is fatal. *The King* v. *Richard Hawkins*, Peake, 8. Buller, J. 1790.

71. Declaration for not removing goods in a *reasonable* time. Contract, to remove *in a month*. The variance is fatal. *Hore* v. *Milner*, Peake, 42, a. Kenyon, C. J. 1797.

72. *Semble*, that the mis-spelling of a name in setting out a record is fatal, though the words be *idem sonantia*; *secus* upon a plea in abatement. *Brown* v. *Jacobs*, *gent.* 2 Esp. 726. Kenyon, C. J. 1799.

And see *Dickenson* v. *Bowes*, 16 East, 110; *Ahitbol* v. *Beneditto*, 2 Taunt. 401.

73. A count for not taking away goods according to conditions of sale, one of which was stated to be the payment of "   l." omitting the sum, which appears in evidence to have been 10l. is bad. *Mertens* v. *Adcock*, 4 Esp. 251. Ellenborough, C. J. 1803.

And see *Samon* v. *Pitt*, Cro. El. 432; S. C. 5 Co. 77, b; *Martham* v. *Jemx*, Yelv. 97, 8; ante, Deed, pl. 3, 12.

74. Declaration for an escape averred that J. S. was brought by habeas corpus before a judge of K. B. who committed him to the custody of the marshal, "as by the said writ of habeas corpus, and the return thereof, and the said commitment thereon, *now remaining in the said court*, more fully appears." Held, that the production of the writ from the King's Bench prison, where it was filed, would not support the action. *Turner* v. *Eyles*, 5 Esp. 8. Alvanley, C. J. 1803.

And the court of C. P. discharged a rule for setting aside nonsuit. *Ibid.* and 3 Bos. & Pul. 456.

Sed vide *Wigley* v. *Jones*, 5 East, 440; S. C. 1 Smith, 458; 1 Wms. Saund. 39, n.

75. Plaintiff declares for a false return to a *fi. fa.* indorsed "to levy 600l. together with the sheriff's poundage, officers' fees, *and other legal charges and incidental expenses attending the levy.*' The writ when produced appears to have been indorsed to levy 600l. together with the sheriff's poundage, officers' fees, *et cætera*. *Semble*, that the variance is fatal. *Stiles* v. *Rawlins and another*, 5 Esp. 133. Ellenborough, C. J. 1804.

76. An agreement to deliver soil, cannot be declared upon as a contract to deliver soil *or breeze*, if it appear that soil and breeze are different articles. *Clark* v. *Manstone*, 5 Esp. 239. Mansfield, C. J. 1805.

S. P. *e converso*, *Penny* v. *Porter*, 2 East, 2; Turner's case, Gilb. Ev. 168; 13 Ed. 4, 46.

77. Indictment for not repairing a road leading from A. to B. and from thence to C. is not supported by evidence of the non-repair of a direct road from A. to C., not passing through B.

though communicating with it. *Rex* v. *Great Canfield*, 6 Esp. 136. Ellenborough, C. J. Essex, 1810.

And see *Philips* v. *Davies*, 2 Anst. 572.

78. A notice of action against a justice of the peace, in which the attorney describes himself as of New Inn, *London*, instead of *Westminster*, is insufficient. *Stears* v. *Smith*, *clerk*, 6 Esp. 138. Ellenborough, C. J. Maidstone, 1810.

79. Declaration in covenant recited a demise of premises, "late in the occupation of *Samuel* R." In the lease it stood "*Saul* R.;" and the name was not contracted either in the indenture or in the record. Held, a fatal variance. *Bowditch* v. *Mawley*, 1 Campb. 195. Ellenborough, C. J. 1808.

And see *Pitt* v. *Green*, 9 East, 188.

80. Plaintiff declared that he was constable *of the parish of St. Paul, Covent Garden*, and that defendant assaulted him in the execution of his said office. It appeared that he had been presented as a fit person to serve as one of the constables of the parish of St. P. C. G., but that he had been sworn in to serve for Westminster generally. Held, a fatal variance. *Goodes* v. *Wheatley*, *esq.* 1 Campb. 231. Ellenborough, C. J. 1808.

81. An indictment for perjury in articles of the peace, exhibited to a magistrate, stated, that the defendant swore "in substance and effect," that A. assaulted her, and at the same *time* threatened to shoot her. The word "time" appeared to have been omitted in the articles. The variance was held fatal. *Rex* v. *Mary Ann Taylor*, 1 Campb. 404. Ellenborough, C. J. 1808.

82. In such a case the deposition should be exactly set forth and the omission supplied by an innuendo. *Ibid.*

83. But where an indictment stated that an action was depending between A. plaintiff, and B. defendant, and the judgment produced began with "B. sued by the name of C. was summoned to answer A.," the omission in the indictment of the name by which B. appeared to have been miscalled in the process, was held to be immaterial. *Rex* v. *Windus*, 1 Campb. 406, n. Ellenborough, C. J. 1808.

84. *Semble*, that if A. B., dean of, &c. and the chapter of the same church, declare for the use and occupation of lands, held by the defendant by the permission of *the said dean and chapter*, and it appear in evidence that the premises were occupied by the defendant before A. B. was dean, the variance is fatal, though the insertion of the name of A. B. was unnecessary. *The Dean and Chapter of Rochester* v. *Pierce*, 1 Campb. 466. Ellenborough, C. J. 1808.

Upon a motion to set aside a nonsuit, the court of K. B. was equally divided. *Ibid.*

Vide Doctr. Plac. 163; 1 H. Bla. 354; ante, ABATEMENT, pl. 7; BILLS, pl. 320, 325; PENAL ACTION, pl. 47. And as to the necessity of naming the head of the corporation, see Co. Litt. 3; Tho. Co. Litt. ; Carter and Claycole's case, 1 Leon. 306, 307; Dyer, 86, a, b.

85. It is a fatal misdescription of a trial at nisi prius to state, that "at the sitting at nisi prius, holden after Michaelmas term, in the 45th year, &c. on the 29th day of November in that year, *in the court of king's bench*, before Edward Lord Ellenborough, then Lord Chief Justice of the same court, the trial came on to be heard in due course of law;" as the words in italics are exclusively applicable to a trial at bar, and the defect is not cured by the general averment with which the sentence concludes. *Woodford* v. *Ashley*, 2 Campb. 193. Ellenborough, C. J. 1809.

And the court refused a rule to set aside nonsuit. *Ibid.* and 11 East, 509.

86. An agreement to sell goods expected by the Fanny *and* Almira, is described in the declaration as an agreement to sell goods expected by the *Fanny Almira*; *semble*, that the variance is fatal. *Boyd* v. *Siffkin*, 2 Campb. 326. Ellenborough, C. J. 1809.

87. An averment in a declaration for a malicious prosecution, that plaintiff was "acquitted by a jury in the court of our lord the king, before the king himself, at Westminster before the chief justice, and discharged thereupon by the court," is not proved by a record, stating that the trial took place before the chief justice at nisi prius, and that the plain-

tiff was discharged by the court in bank. *Woodford* v. *Ashley, ubi supra.*

And the court of K. B. refused a rule for a new trial. *Ibid.* and 11 East, 508.

88. Though a commission of bankrupt passes the great seal, it does not *issue out of chancery.* And *semble*, that an averment to the former effect, would be fatal. *Poynton* v. *Forster and others*, 3 Campb. 58. Ellenborough, C. J. 1811.

89. An averment in a declaration for maliciously suing out a commission of bankrupt, that the commission was *duly superseded*, is not supported by producing the chancellor's order, directing it to be superseded. *Ibid.*

And as to the malice, see ante, ACTION ON THE CASE, A. (...); *ibid.* A. (h).

90. An undertaking to deliver goods to A. is not proved by an agreement to deliver goods to the bearer of a receipt for the goods given by the defendant. *Samuel* v. *Darch and others*, 2 Stark. 60. Ellenborough, C. J. 1817.

91. A covenant to repair, "fire and *all other casualties excepted*," cannot be declared on as a covenant to repair generally. *Tempany* v. *Burnand*, 4 Campb. 20. Ellenborough, C. J. 1814.

And see *Howell* v. *Richards*, 11 East, 633; *Tempest* v. *Rawling*, 13 East, 18, 20.

92. Plaintiff declares that on such a day the defendant made his bill, *bearing date the same day and year as aforesaid.* The real date is different. The variance is fatal. Anon. 2 Campb. 308, n. Ellenborough, C. J. 1809.

S. P. *Baynham* v. *Matthews*, Fitzg. 130.

93. Declaration on policy "on plaintiff's share of goods." The policy was originally "on profits of goods," but was enlarged by a marginal insertion with defendant's initials. Held, that the original agreement need not be set in the declaration. *Robinson* v. *Tobin*, 1 Stark. 336. Ellenborough, C. J. 1816.

94. Special assumpsit by landlord against assignees of a bankrupt, on an agreement to pay 10s. in the pound for rent, due from bankrupt and themselves. It appeared that part of the consideration was that plaintiff should accept a surrender, which was not noticed in the special count. Upon which omission the plaintiff was nonsuited. *Dashwood* v. *Peart and Davis.* Sittings after H. T. 1818.

95. In a declaration on a bill of exchange, the omission of the word "sterling" is immaterial. *Glossop* v. *Jacob*, 1 Stark. 69. Ellenborough, C. J. 1815.

S. C. not S. P. 4 Campb. 227.

96. A British-built vessel is let to freight, as "the Swedish ship, called the Maria," but is documented as a Swedish ship. The freighter is unacquainted with the circumstances. He cannot set up the misdescription as a defence to an action for not loading. *Reusse* v. *Meyers*, 3 Campb. 475. Ellenborough, C. J. 1813.

97. In an action against A. on a bond declared upon as the joint bond of A. and B., A. pleads that it is not his deed. It is only necessary to prove that the bond was executed by A. *Middleton* v. *Sandford*, 4 Campb. 34. Dampier, J. 1814.

98. A joint and several bond may be declared on simply as a joint bond. *Middleton* v. *Sandford*, 4 Campb. 34. Dampier, J. 1814.

99. Notice of action against a J. P. under 22 Geo. II. (24 Geo. II. cap. 44) describing plaintiff's attorney as of New Inn, London, instead of New Inn, Westminster. Held insufficient. *Stears* v. *Smith, clerk*, 6 Esp. 138. Ellenborough, C. J. Maidstone, 1810.

And see *Taylor* v. *Fenwick*, 7 T. R. 635, n; more fully reported, 3 B. & P. 553 (n) a.

100. Declaration, *qui tam*, for insuring a particular lottery ticket at 42l.; proof that this sum was paid as the premium for insuring that ticket and others, the variance is fatal. *Phillips, qui tam*, v. *Mendez da Costa*, 1 Esp. 59. Kenyon, C. J. 1793.

101. Declaration for insuring a lottery ticket, without mentioning any premium; proof, that the ticket was insured at a certain premium. This is no variance. *Ibid.*

D. How taken advantage of.

102. Where a declaration omits a

proviso, which goes in defeasance of the covenant declared on, the defendant must have oyer and demur. He cannot take advantage of the omission upon *non est factum*. *Gordon* v. *Gordon*, 1 Stark. 294. Ellenborough, C. J. 1816.

103. A defendant is not precluded from insisting upon a variance, by an admission produced at the trial "of the due execution of the deed mentioned in the declaration." *Goldie* v. *Shuttleworth*, 1 Campb. 70. Ellenborough, C. J. 1807.

104. *Semble*, that it would be otherwise if the admission had run "*as* mentioned in the declaration." *Ibid.*

VENDOR AND PURCHASER.

A. SALE.

(a) *Entire contract.*

(b) *Conditional contract.*

(c) *Contract, when perfect.*

(d) *Concealment.*

B. DELIVERY, WHAT SHALL BE.

C. RIGHTS OF VENDOR.

D. LIABILITY OF VENDOR.

E. RIGHTS OF VENDEE.

F. LIABILITY OF VENDEE.

G. BILL OF SALE.

(a) *Possession under.*

A. SALE.

A. (a) *Entire contract.*

1. Where three articles are ordered from a tradesman at the same time, at separate prices, the purchaser may consider the contract as entire, and may refuse to receive one article without the rest. *Champion* v. *Short*, 1 Campb. 53. Ellenborough, C. J. 1807.

And see Dig. 21, 1, 34; *Ibid.* 21, 1, 59, 1; *Ibid.* 21, 2, 72; 5 Vin. Abr. 511, 515; ante, BILLS AND NOTES, pl. 237.

2. But if he accept one of the articles, and another be tendered without the third, he cannot reject it, having himself severed the contract. *Ibid.*

And see Dig. 21, 1, 38; ante, AUCTION, pl. 8.

3. Purchaser of lands, takes growing crops at a valuation. The purchaser enters, but the seller can make no title to the lands. The contract being *entire*, the seller cannot maintain *indebitatus assumpsit* for the crops. *Neale and others* v. *Viney*, 1 Campb. 471. Ellenborough, C. J. Guildford. 1808.

Sed vide ante, USE AND OCCUPATION. pl. 1.

4. Held that an agreement to sell 100 sacks of flour, at 94s. 6d. per sack, is an entire contract, and that if after delivery and acceptance of part, the vendor refuse to deliver the remainder, he cannot recover the price of the quantity delivered. *Walker* v. *Dixon*, 2 Stark. 281. Ellenborough, C. J. 1817.

But the court of K. B. set aside the verdict; *ex relatione* Wilde, of counsel for the defendant. And see APPENDIX.

5. Purchaser of two houses in distinct lots, may refuse to take one house if no title can be made to the other. *Chambers* v. *Griffiths et alt.* 1 Esp. 150. C. J. 1794.

But see *Poole* v. *Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; S. C. 6 Ves. 676; Sugd. V. & P. 5 edit. 247.

6. Where two lots are bought at an auction the agreements for each lot are separate, and cannot be treated or declared on as one contract. *James and another* v *Shore*, 1 Stark. 426. Ellenborough, C. J. 1816.

7. A. is employed by B. to sell his horse; A. sells B.'s horse, and another belonging to C., at an entire price to D., and warrants both horses sound; sever the contract, and bring his actions upon the warrants against A. in respect of the unsoundness of his horse. *Symonds* v. *Carr*, 1 Campb. 361. Ellenborough, C. J. 1808.

S. P. *Hort* v. *Dixon*, Selw. 101.

8. A sale of coals to A. & B. who agree to divide the quantity between them, cannot be described in pleading as a sale to A., though a separate delivery be made to A. of his share. *Parish, qui tam*, v. *Burwood*, 5 Esp. 33. Ellenborough. C. J. 1803. and *Everett, qui tam*, v. *Tindall*, 5 Esp. 169. Ellenborough, C. J. 1804.

A. (b.) *Conditional contract.*

9. An agreement whereby the defend-

ants sell to the plaintiff, a certain quantity of goods expected, by a particular vessel, *on arrival*, is a conditional contract dependent on the arrival of the *goods*. No action will therefore lie for the non-delivery of the goods on the arrival of the *vessel in ballast*. *Hawes* v. *Humble*, 2 Camp. 327 n. Wood, B. Lancaster, 1809.

And see ante, AGREEMENT, pl. 28, 29.

10. Consequently the statement of such an agreement as an undertaking to sell on the arrival *of the vessel* is a fatal misdescription of the contract. *Boyd* v. *Siffkin*, 2 Campb. 326. Ellenborough, C. J. 1809.

11. Where defendants sold to the plaintiffs all the hemp, not exceeding 300 tons, which might be loaded in a certain vessel *by the agent of the concern*, who shipped only 71 tons for defendants, and filled up the vessel on the account of other correspondents, it was held, that defendants were not liable for the non-delivery of the residue of the 300 tons. *Hayward and others*, v. *Scougall and others*, 2 Campb. 56. Ellenborough, C. J. 1809

A. (c) *Contract, when perfect.*

12. A broker sells goods for the house of A and B., but fills up the bought note in the names of A. and C., (the former firm.) The purchaser is bound, unless he would be thereby deprived of a set off against A. and C. *Mitchell and others*. v. *Lapage*, Holt 253. Gibbs, C. J. 1816.

A. (d) *Concealment.*

13. Vendor of ship sold "with all faults" held to be bound to disclose a latent defect known to himself, which it was impossible for the vendee to discover. *Mellish and another* v. *Motteux and others*, Peake, 115. Kenyon, C. J. 1792.

14. But in a subsequent case, it was held, that a vendor is not liable under such circumstances, unless it can be shewn that he has used some artifice for the purpose of concealing such defect from the vendee. *Baglehole* v. *Walters*, 3 Campb. 154. Ellenborough, C. J. 1812.

And see ante, ACTION ON THE CASE, pl. 85.

15. In an action for the price of a *Claude* sold to defendant to plaintiff's agent, who had refused to disclose his principal, but knowingly suffered defendant to buy, under the impression that it was the property of another person, the sale was held bad on the ground of fraud, even though proved to be a real *Claude*. *Hill* v. *Gray*, 1 Stark. 434. Ellenborough, C. J. 1816.

16. Where the conditions of sale, provide that any mistake in the particular, shall not vitiate the contract. such stipulation does not extend to a willful misdescription of the situation of the property, calculated to inhance its apparent value. *Duke of Norfolk* v. *Worthy*, 1 Campb. 340. Ellenborough, C. J. 1808.

17. Conditions of sale pasted on the auctioneer's box, gives sufficient notice to the buyer. *Mesnard* v. *Aldridge*, 3 Esp. 571. Kenyon, C. J. 1801.

B. DELIVERY, WHAT SHALL BE.

(And see ante, FRAUDS STATUTE OF, C. (a); STOPPAGE IN TRANSITU; post, F. (a)).

18. Upon a verbal agreement for the purchase of wine, the vendor's clerk cut the spills from the casks, and marked them with the vendee's initials in the presence of all parties. Held, that this was a sufficient delivery to take the sale out of the statute of frauds. *Anderson* v. *Scot*, 1 Campb. 235, n. Ellenborough, C. J. 1806.

19. But the delivery not having been perfected, it was held to be no bar to an action for *not delivering* the goods according to contract. *Ibid.*

And see Dig. 18, 6, 1, 2. APPENDIX, VI.

20. Where goods are sold, to be paid for in 30 days, and if not then removed, to be liable to warehouse rent, the property vests in the purchaser immediately, and remains at his risk, *Phillimore and others*, v. *Barry and another*, 1 Campb. 513. Ellenborough, C. J. 1808.

Acc. *Elmore* v. *Stone* 1 Taunt. 458.

21. But the property in goods continues in the vendor, whilst any thing remains to be done on his part to ascertain the sum which he is to receive

for them. *Zagury* v. *Furnell and another*, 2 Campb. 240. Ellenborough, C. J. 1809, and Mansfield, C. J. 1810.

S. P. Dig. 18, 6, 1, 1; and see Keilw. 77.

22. A delivery order lodged with the warehouseman is a sufficient transfer of the possession, although no entry be made in his books, provided nothing remains to be done to ascertain the price. *Withers* v. *Lyss and others*, 4 Campb. 237, & Holt, 18. Gibbs, C. J. 1815.

23. But where the goods are sold by weight, the property does not vest in the vendee until the weight has been ascertained, although the sale embrace the whole of the specific parcel of goods. *Ibid.*

N. But *semble*, that where the vendor is prevented from completing the delivery by the act of the vendee, the property is at the risk of the latter. Dig. 18, 6, 5. Sed vide ante, TENDER, pl. 30. And see *Rugg* v. *Minett*, 11 East, 210; *Whitehouse* v. *Frost*, 12 East, 614; *Wallace* v. *Breeds*, 13 East, 534.

24. A West-India-Dock warrant, indorsed and delivered for a valuable consideration, passes the property, so as to destroy the right of stoppage in transitu. *Zwinger and another* v. *Samuda*, Holt, 395. Park, J. 1816.

And the court of C. P. discharged a rule for a new trial. H. T. 1817. *Ibid.*

25. A. receives a dock delivery order for goods entered in the books of the West India Dock in his name. A. upon selling the goods to B. indorses the order to him. B. sells the goods to C. on credit, and delivers the order. Held, that on C.'s insolvency, A. cannot take possession of the goods, though they continue in his name, and the order has not been lodged with the Dock Company. *Spear* v. *Travers and another*, 4 Campb. 251. Gibbs, C. J. 1815.

26. Warehouseman at the request of vendor, gives a written acknowledgment to the vendee, that he holds the goods on account of the latter. He cannot refuse to deliver them, on the ground that by custom, the property does not vest in the vendee until the article is remeasured, and that the vendor became bankrupt before any remeasurement had taken place. *Stonard* v. *Dunkin*, 2 Campb. 344. Ellenborough, C. J. 1810.

27. A delivery at a wharf to an unknown person found there, is not sufficient to charge wharfinger or vendee. *Buckman* v. *Levi*, 3 Campb. 414. Ellenborough, C. J. 1813.

See *Clarke* v. *Hutchins*, 14 East, 475.

28. A bank note is paid by A. to B., and by B. to C. who presents it at the Bank, where it is stopped. A. after paying the amount to C. cannot maintain trover against the Bank. *Benjamin* v. *Bank of England*, 3 Campb. 417. Ellenborough, C. J. 1813.

C. RIGHTS OF VENDOR.

(And see, ante, AGENT, C. (a) pl. 39; ASSUMPSIT, pl. 23, 4, 6, 9, 30, 2, 4, 5, 6.)

29. *Indebitatus assumpsit* for goods bargained and sold, will lie for goods which the vendee refuses to take on a false allegation that the quality is not agreeable to the contract. *Hankey* v. *Smith*, Peake, 42, n. Kenyon, C. J. 1796.

30. And the plaintiff is entitled to recover the full price. *Ibid.*

31. *Secus*, upon a special count for non-acceptance. *Ibid.*

32. *Dubitatur*, whether an importer of hemp from Russia, not being a member of the Russia company, can maintain an action against a vendee for not accepting the goods. *Gross and another* v. *La Page*, Holt, 105. Dallas, J. 1815.

33. Goods are sold to a minor upon a false and fraudulent representation by his father that he has relinquished his business in favour of his son. The father is liable, either as principal vendee, or as partner with his son. *Biddle and Loyd* v. *Emanuel Levy*, 1 Stark. 20. Gibbs, C. J. 1815.

34. After a *resale*, the vendor cannot bring an action for goods *bargained and sold*. *Hore* v. *Milner*, Peake, 42, a. Kenyon, C. J. 1797.

35. But in a subsequent case the resale was held to be no bar to the action, though it might perhaps be considered as a wrongful conversion. *Mertens* v. *Adcock*, 4 Esp. 251. Ellenborough, C. J. 1803.

36. If the buyer neglect to remove the goods within a reasonable time, the

seller may charge him with warehouse rent. *Greaves* v. *Ashlin.* 3 Campb. 426. Ellenborough, C. J. 1813.

37. Or he bring an action for not removing them, where he is prejudiced by the delay. *Ibid.*

38. But he cannot resell them. *Ibid.*

And see Noy's Maxims, 87, 88; *Alexander* v. *Comber*, 1 H. Bla. 20; Sed vide *Langfort* v. *Tiler*, 1 Salk. 212.

39. Vendor of a term which is stated in the contract to have one year more to run than it has, may procure an enlargement of the term after he has commenced an action for the non-completion of the purchase, provided no conveyance have been demanded *Thomson* v. *Miles*, 1 Esp. 184. Kenyon, C. J. 1794.

40. In an action for not completing a purchase, the vendor need not prove the execution of the deeds which form his title. *Ibid.*

41. Where goods are sold at credit, and the vendor discovers that the purchase is fraudulent, he may sue the vendee without waiting for the expiration of the credit. *De Symons* v. *Minchwick.* 1 Esp. 430. Eyre, C. J. 1795.

42. The obtaining of goods by a party who knows himself to be insolvent, upon bills drawn upon parties who are in the same circumstances, will not render the contract of sale void, unless the purchaser contrive the bills for the purpose of gaining possession of the goods. *Noble* v. *Adams*, Holt, 248. Gibbs, C. J. 1816.

43. Upon an agreement to pay for goods by bill at two months, to be given at the end of one, the plaintiff may declare generally after the expiration of the three months. *Heron* v. *Granger*, 5 Esp. 219. Ellenborough, C. J. 1805.

S. P. *Brooks* v. *White*, 1 N. R. 330; *Marshall* v. *Poole*. 13 East, 98.

And see ante, Agent; Set off, pl. 14.

44. Goods are sold "without recourse on the buyer in case of non-payment," for a bill which the vendee knows to be worth nothing. The vendor cannot maintain *assumpsit* for the value of the goods, but must sue in *tort*. *Read* v. *Hutchinson*, 3 Campb. 352. Ellenborough, C. J. 1813.

And see ante, Frauds, Statute of, pl. 31.

45. Auctioneer may sue the vendee in his own name, though the name of the vendor be declared at the time of sale. *Athyns and Batten* v. *Amber*, 2 Esp. 493. Eyre, C. J. 1796.

And see *Coppin* v. *Craig*, 7 Taunt. 243; *Coppin* v. *Walker*, *Ibid.* 237.

46. Where A., a vendor re-purchases goods from B., an insolvent vendee, by the intervention of C., in whose name the re-purchase is effected, as for his own account; and B. afterwards, at the request of A., gives to B. an order upon C. for payment; B.'s assignees cannot recover the value of the goods, unless the re-sale can be shewn to have originated with B., although A.'s instructions to C. were to purchase as cheap as he could, but at all events to purchase, and though the price required by B. and acceded to by C. much exceeded the market price. *Harris and another, assignees of Brendon*, v. *Lunell and others.* Graham, B. Bristol, 1819.

F. Liability of Vendor.

(And see ante, Action on the case, B. (f); Assumpsit, E. (c) (g).)

47. An action does not lie against a party who, without being aware of the circumstance, has sold a house in which some of the flooring is rotten. *Bowles* v. *Adkinson*, Sugden, Vend. and P. 270. Kenyon, C. J.

48. If the intended grantor of an annuity, falsely state that there are no judgments against him, in consequence of which the grantee does not search until the transaction is ready to be completed, the former is chargeable with the expenses incurred. *Coore* v. *Callaway*, 1 Esp. 115. Kenyon, C. J. 1794.

49. *Semble*, that where the vendor of goods resells them in consequence of their not being taken away, and afterwards brings an actiou for goods *bargained and sold*, he is liable to the vendee in trover. *Mertens* v. *Adcock*, 4 Esp. 251. Ellenborough, C. J. 1803.

Ante, pl. 35, 36, 39.

50. It is no defence to an action for not accounting for goods delivered to the master of a vessel to be sold by him

abroad, that they were exported without paying duty; unless the evasion formed part of the contract. *Catlin* v. *Bell*, 4 Campb. 183. Ellenborough, C. J. 1815.

51. The vendor of goods to be loaded at Petersburg in a certain ship before a certain day, is not excused by the goods having been seized by the Russian government, whilst in lighters for the purpose of loading, and the ship's having been obliged to put to sea to avoid an embargo. *Splidt* v. *Heath and others*, 2 Campb. 54, n. Ellenborough, C. J. 1809.

52. Where goods are described in the sale note as of a particular quality, it is not sufficient to shew that the quality, though inferior to the description, corresponds with a sample previously delivered to the purchaser. *Tye* v. *Fynmore*, 3 Campb. 462. Ellenborough, C. J. 1813.

S. P. *e converso*, post, WARRANTY, pl. 6.

53. In avoidance of a sale made by a broker, it may be shewn, that by the custom of the trade the authority to sell expires with the day on which it is given. *Dickenson* v. *Lilwall and others*, 4 Campb. 279; 1 Stark. 121. Ellenborough, C. J. 1815.

E. RIGHTS OF VENDEE.

(And see ante, ACTION ON THE CASE, B. (f); AGENT, A. 8; ASSUMPSIT, E. (c) (g); INTEREST, A. 15.

54. A purchaser may refuse to accept a conveyance executed under a power of attorney. *Coore* v. *Calloway*, 1 Esp. 115. Kenyon, C. J. 1794, and *Richards* v. *Barton*, 1 Esp. 268. Kenyon, C. J. 1795.

And see *Baxter* v. *Lewis*, Forrest, 61.

55. A receipt signed " A. for B." A. being in fact only clerk to B. is not sufficient to charge A. in an action for money had and received. *Edden* v. *Read*, 3 Campb. 339. Ellenborough, 1813.

And see 4 Taunt. 198.

56. Where, by the conditions of sale the vendor undertakes to make out a good title by a certain day, the vendee is not bound to make any application to the vendor on the subject before that day. *Berry* v. *Young*, 2 Esp. 640, n. Kenyon, C. J. 1788.

57. And if the vendor fail then to produce his title deeds, the vendee may recover his deposit from the auctioneer. *Ibid.*

58. The auctioneer being merely a stakeholder, cannot discharge himself by paying over the amount to the vendor. *Jones* v. *Edney*, Sugd. Vendor and Purchaser, 37. Ellenborough, C. J. 1812.

S. C. not S. P.

And see *Burrough* v. *Skinner*, 5 Burr. 2630; *Edwards* v. *Hodding*, 5 Taunt. 815; 1 Marsh, 377.

59. Assumpsit lies for the interest of money procured to complete a purchase, and the expenses of investigating the title, and preparing the conveyance, where the vendor misrepresents the charges affecting the estate. *Richards* v. *Barton*, 1 Esp. 268. Kenyon, C. J. 1795.

60. S. P. *Turner* v. *Beaurain*, Sugden, Vendor & Purchaser, 209. Ellenborough, C. J. 1806.

And see *Flureau* v. *Thornhill*, 2 Bla. 1078; ante, ASSUMPSIT, E. (c).

61. And if the action be brought against an agent selling without sufficient authority, the costs of a suit against the owner for a specific performance may be included. *Jones* v. *Dyke and others*, Sugd. V. & P. App. No. VIII. Macdonald, C. B. Hereford, 1807.

And see ante, AUCTION, pl. 5, 7.

62. But nothing is recoverable for the loss of the bargain. *Ibid.*

S. P. *Flureau* v. *Thornhill*, 2 Bla. 1078; *Bratt* v. *Ellis*, C. P. M. & H. 45 Geo. III; Sugden, Vendor & Purchaser, App. No. VII.

63. In an action by the vendee to recover the deposit paid upon a contract for the purchase of an estate, the defendant may call for a particular of the grounds upon which the plaintiff considers the contract as rescinded. *Squire* v. *Tod and others*, 1 Campb. 293. Mansfield, C. J. 1808.

64. But if no such particular be required, the vendee may avail himself of any objection at the trial, though he may previously have insisted upon one objection only. *Ibid.*

And see *Collett* v. *Thompson*, 3 Bos. & Pul. 246.

65. Contract for goods " free on

board a foreign ship," the seller cannot be required to give an order for transferring them into the purchaser's name in the warehouse. *Wackerbarth* v. *Masson*, 3 Campb. 270. Ellenborough, C. J. 1812.

66. S. P. ruled in *Wetherell* v. *Coape*, 3 Campb. 272, n. Mansfield, C. J. 1812.

67. On a sale in London of goods at sea, it is agreed, that if they shall not arrive on or before the 31st of December, the bargain shall be void: the parties must be understood to have had in contemplation an arrival at London only. *Idle and others* v. *Thornton and others*, 3 Campb. 274. Ellenborough, C. J. 1812.

And the court refused a rule to set aside nonsuit. *Ibid.*

69. Where an agreement for sale is unsigned and unstamped, the purchaser may recover the deposit on the common counts. *Adams* v. *Fairbain*, 2 Stark. 277. Abbott, J. 1817.

70. The execution of the conveyance by the vendor is a condition precedent to, and not concurrent with, the payment of the purchase money. *Ibid.*

N. In this case an assignment was to have been executed, not by the vendor, but by a former proprietor, in whom the legal estate remained; but the decision does not appear to have been grounded on the necessity of the vendor's completing his own title.

71. Notwithstanding a usage in the master's office, for the solicitor of the vendor, to procure the confirmation of the sale of the expense of the vendee, the latter may employ their own solicitor. *Devon and another* v. *Fricker*, 2 Stark. 170. Abbott, J. 1817.

F. Liability of vendee.

(And see ante, Agent, pl. 5; Assumpsit, pl. 23; Bills and notes, pl. 76, 81; Carrier, pl. 33; Evidence, pl. 86.

72. A person treating for the purchase of a lease described as containing none but the usual covenants, is not bound to accept the assignment of a lease containing an unusual covenant, though such covenant appear to be inoperative and bad in law. *Hartley* v. *Pehall*, Peake, 131. Kenyon, C. J. 1792.

73. Vendee enters into possession and holds the premises until it is discovered that the vendor has no title. No action lies for the occupation, unless it appear to have been beneficial. *Hearn and another* v. *Tomlin*, Peake, 192. Kenyon, C. J. 1793.

S. P. Dig. 12, 6, 65, 7.

And see *Kirtland* v. *Pounsett*, 2 Taunt. 145.

74. Upon a sale of lands, it was agreed that the purchaser should take the growing crops at a valuation. The crops were valued, and the purchaser entered, but the seller could make no title to the lands. Held that the contract being entire, the seller could not recover in *indebitatus assumpsit* for the crops. *Neale and others*, v. *Viney*, 1 Campb. 471. Ellenborough, C. J. Guildford, 1808.

And see ante, A. (a) 1, 2; *Corder* v. *Drakeford*, 3 Taunt. 32.

75. If an artist exhibit specimens to a person who contracts with him for a painting of a particular size at a certain price, and the picture sent home is of inferior execution, the vendee must either return it or pay the full price. *Grimaldi* v. *White*, 4 Esp. 95. Lawrence, J. 1802.

And see *Hunt* v. *Silk*, 5 East, 449, 52; S. C. 2 Smith, 15; *Baston* v. *Butter*, 7 East, 479; *Taylor* v. *Hare*, 1 N. R. 260; post, Warranty, pl. 6, 7.

76. If goods, bought by sample, do not correspond with the sample exhibited, the vendee is not bound to complete the purchase, on being allowed a compensation for the inferiority of the bulk to the sample; notwithstanding the existence of an usage in the trade to that effect. *Hibbert* v. *Shee and another*, 1 Campb. 113. Ellenborough, C. J, 1807.

And see *Parkinson* v. *Lee*, 2 East, 314.

77. In an action for the price of clothes ordered by the defendant, sent to his house and immediately returned, it lies upon the plaintiff to shew that the articles were prepared agreeably to the order given. *Hayden* v. *Hayward*, 1 Campb. 180. Mansfield, C. J. 1808.

78. Where a purchaser finds that the commodity is not according to order,

and is unfit for his purpose, he should immediately return it, or give notice to the vendor to take it back. *Fisher* v. *Samuda and another*, 1 Campb. 190. Ellenborough, C. J. 1808.

80. Where inferiority of quantity is set up on a defence, an offer to return the article must be shewn. *Groning and another* v. *Mendham*, 1 Stark. 257. Ellenborough, C. J. 1816.

81. Although the quality be warranted. *Hopkins* v. *Appelby*, 1 Stark. 477. Ellenborough, C. J. 1810.

And see *Mitchinson* v. *Hewson*, 7 T. R. 350.

82. A vendee who has had an opportunity of examining the article at the time of delivery, cannot set up the badness of quality as a defence to an action, for the price. *Bluett* v. *Osborne*, 1 Stark. 384. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

83. Nor if he pay the amount can he recover it back. *Ibid.*

84. Where goods are delivered of the sort agreed upon, the price cannot be recovered back in an action for money had and received, as upon a total failure of consideration, although the goods appear to be in a very bad condition, and even wholly unfit for use. *Fortune* v. *Lingham*, 2 Campb. 416. Ellenborough, C. J. 1810.

85. In an action for the nondelivery of goods, which were to be paid for *by bill*, it appears that the purchaser tendered *his own acceptances*. No evidence can be received to shew, that by *bill* is meant an *approved bill*. *Hodgson* v. *Davies*, 2 Campb. 530. Ellenborough, C. J. 1810.

86. And *semble*, that even if an approved bill had been mentioned in the contract, it must be understood only to mean a bill to which no reasonable objection could be made, and which therefore *ought* to be approved; not to give the seller a power of repudiating any bill according to his interest or caprice. *Ibid.*

And see *Adam* v. *Richards*, 2 H. Bla. 573; *Thirsby* v. *Helbot*, 3 Mod. 273.

87. Where a broker employed by A. B. and C., to sells goods, fills up the bought note with the names of A. B. and C., (the former firm,) the purchaser is liable to A. B. C., unless he shew he has been prejudiced or excluded from a set off. *Mitchell and others*, v. *Lapage*, Holt, 253. Gibbs, C. J. 1816.

88. Conditions of sale, pasted upon the auctioneer's box, give sufficient notice to the purchaser. *Mesnard* v. *Aldridge*, 3 Esp. 271. Kenyon, C. J. 1801.

89. In an action against the vendee for not completing a purchase, the vendor is not bound to prove the execution of the deeds which constitute his title. *Thomson* v. *Miles*, 1 Esp. 184. Kenyon, C. J. 1794.

Sed vide ante, Title, pl. 1.

90. Purchaser of goods to be paid for by bill on agent, who has no convertible funds, is not discharged by renewal of bill without notice. *Clarke and another* v. *Neale*, 3 Campb. 411. Ellenborough, C. J. 1813.

And see ante, Surety, pl. 1.

91. Commissioners under an inclosure, sold lots by auction to A., and upon his refusing to complete the purchase, resell to B. They cannot sue A. for lands bargained and sold. *James and another*, v. *Shore*, 1 Stark. 426. Ellenborough, C. J. 1816.

92. Where a public act of parliament authorizes the granting of redeemable annuities, the purchaser cannot object that the conditions of sale were silent as to the power of redemption. *Coverley* v. *Burrell*, 2 Stark. 295. Ellenborough, C. J. 1817.

93. A warrant against the felon, under 31 Eliz. cap. 12. sect. 4. will not justify the taking of the stolen horse out of the hands of the owner. *Josephs* v. *Adkins*, 2 Stark. 76. Ellenborough, C. J. 1817.

G. Bill of sale.

(And see ante, Evidence, pl. 250, 251.)

G. (a) *Possession under.*

94. Where a party takes possession under a bill of sale, but suffers the vendor to continue selling the property in the usual way of his trade, the possession is colorable, and the bill of sale void. *Paget et alt.* v. *Perchard et alt. sheriffs of London*, 1 Esp. 205. Kenyon, C. J. 1795.

And see *Smith* v. *Russell*, 3 Taunt. 400.

97. Where the vendor remains in possession jointly with the servant of the vendee, the assignment is void as against creditors, and the goods may be taken in execution. *Wordall* v. *Smith and another, sheriff of Middlesex*, 1 Campb. 333. Ellenborough, C. J. 1808.

98. But where the trustee of the separate estate of a wife, purchases effects under an execution against the husband, the assignment is valid, although no change of possession take place. *Cross* v. *Glode, knight, and another, sheriffs of London*, 2 Esp. 574. Kenyon, C. J. 1794.

And see *Cadogan* v. *Kennett*, Cowp. 432; *Jarman* v. *Wooloton*, 3 T. R. 618; *Darby* v. *Smith*, 8 T. R. 82; S. C. 6 Ves. 488; *Dewey* v. *Baynton*, 6 East, 257; *Hungerford* v. *Earle*, 2 Vern. 261; S. C. Eq. Ca. Abr. 148; *Fletcher* v. *Lady Sidley*, 2 Vern. 490; S. C. 1 Eq. Ca. Abr. 148; *Lady Arundell* v. *Phipps*, 10 Ves. 139; *Jones* v. *Dwyer*, 15 East, 21.

99. If a person *not being a creditor*, take a bill of sale of goods sold under a *fi. fa.* he need not take immediate possession. *Kidd* v. *Rawlinson*, 3 Esp. 52. Eldon, C. J. 1799.

And the court of C. P. refused a rule for entering a nonsuit. *Ibid.* and 2 Bos. & Pull. 59.

And see *Leonard* v. *Baker*, 1 M. & S. 251; Bull N. P. 257, 8; *Edwards* v. *Harben*, 2 T. R. 587, 594; Pothier, Traité du Contrat de Vente, Part. 5. chap. 1. num. 321; 1. 4, 6, 6; *Smith* v. *Russell*, 3 Taunt. 400.

VENUE.

A. Where laid.

(And see ante, Bills and notes, 334; Game, pl. 8; Officer, pl. 14, 15; Tidd, 309; 1 Wms. Saund. 8, 238, 241, 308.)

1. In an action for designating the plaintiff's house as a brothel, by suspending a burning lamp in front of it, the venue is transitory. *Jefferies* v. *Duncombe*, 2 Campb. 3. Ellenborough, C. J. 1809.

2. And if the house be described standing in a particular parish, the parish must be considered as stated by way of *venue*, not of *local description*. It is therefore immaterial whether any such parish exists. *Ibid.*

And the court of K. B. discharged a rule for setting aside a verdict for the plaintiff. *Ibid.* and 11 East, 226

And see *Frith* v. *Gray*, 4 T. R. 561; *Drewry* v. *Twiss*, *Ibid.* 558; *Mersey & Irwell Navigation Company*, v. *Douglas*, 2 East, 437.

3. In local actions, it is sufficient if the venue be laid in a reputed parish which has a church and overseers of its own, though the place may, in strictness, be only a hamlet. *Anonymous*, 2 Campb. 5, n. Ellenborough, C. J. Hertford, 1809.

4. *Quære*, whether it is necessary in an indictment, to lay the act in a particular place within the county. *Goldsmith's case*, 3 Campb. 77. Lawrence, J. Gloucester, 1811.

And see Co. Litt. 125, n. *where the affirmative is assumed*. Keilw. 33, b. 34, a; 39, a; 18 Hen. 6. cap. 12. F. N. B. 115, I.

5. The offence of driving a distress out of the hundred is not complete until the cattle have entered the second hundred. Therefore, if the latter be situated in a different county, the venue must be laid there, or the plaintiff will be nonsuited under 21 Jac. I. cap. 4. s. 1. *Pope, qui tam*, v. *Davies*, 2 Campb. 266. Ellenborough, C. J. Maidstone, 1809.

And see Savile, 58; Plowden, 35.

VESTRY.

A. General.

(a) *How constituted.*

(b) *Authority of general vestry.*

(c) *Proceedings, how proved.*

B. Select vestry.

(a) *How created.*

A. General.

A. (a) *How constituted.*

1. The vicar is not an integral part of the vestry. *Mawley* v. *Barbet et alt.* 2 Esp. 687. Kenyon, C. J. 1798.

And see *Stoughton* v. *Reynolds*, Ca. T. H. 274; S. C. 2 Stra. 1045.

2. And an election of churchwardens in his absence is valid. *Ibid.*

S. P. Churchwardens of Northampton's case, Carth. 118.

A. (b) *Authority of general vestry.*

3. An order of vestry regulating the mode of voting for churchwardens, is not binding upon a subsequent vestry who may proceed to an election without noticing such order. *Mawley* v. *Barbet et alt.* 2 Esp. 687. Kenyon, C. J. 1798.

4. A vestry meeting has no power to rescind an election of churchwardens at a preceding vestry. *Ibid.*

A. (c) *Proceedings, how proved.*

5. Where a statute requires previous notice to be given, it is sufficient to shew an entry in the vestry book, purporting that the vestry was duly held in pursuance of notice. *Rex* v. *Martin*, 2 Campb. 100. Macdonald, C. B. Maidstone, 1809.

And see *Cox* v. *Copping*, 5 Mod. 396; *Rex* v. *Mothersell*, 1 Strange, 93; *Rex* v. *Hostmen* of Newcastle, 2 Stra. 1222; *Ibid.* 1223, n; *Rex* v. *Mayor*, *&c.* of Liverpool, 4 Burr. 2244.

B. Select vestry.

B. (a) *How created.*

6. A select vestry can only exist by immemorial usage. *Berry and another* v. *Banner and another*, Peake, 156. Kenyon, C. J. 1792.

7. A faculty from the bishop creating a select vestry is void. *Ibid.*

And see *Dawson* v. *Fowle*, Hardres, 378; *Butterworth* v. *Walker*, 3 Burr. 1691.

WARRANTY.

A. Warranty of the quality of goods.

(a) *What shall amount to a warranty.*

(b) *Warranty, when broken.*

(c) *Remedy in case of breach of warranty.*

B. Warranty of contingent events.

A. Warranty of the quality of goods.

A. (a) *What shall amount to a warranty.*

1. A person sells a horse as of the age stated in a written pedigree, declaring that he knows nothing of the horse but what he has learnt from the pedigree. This is a warranty. *Dunlop* v. *Waugh*, Peake, 123. Kenyon, C. J. 1792.

2. But setting the name of an old master against a picture in a sale catalogue, is merely a representation of the seller's opinion, and no warranty. *Jendwine* v. *Slade*, 2 Esp. 572. Kenyon, C. J. 1797.

And see ante, Insurance, pl. 118; *Pasley* v. *Freeman*, 3 T. R. 51, 7.

3. The law implies no warranty upon an exchange of goods. *La Neuville and another* v. *Nourse and another*, 3 Campb. 351. Ellenborough, C. J. 1813.

And see post, A. (c) pl. 21.

4. Where, therefore, a wine merchant exchanges one sort of wine with a customer for another which he had previously sold him. the customer is not liable for the deterioration of the returned wine, without proof of an express warranty, or of fraud. *Ibid.*

N. But it is said that the law implies a warranty upon a sale of provisions. Keilw. 91, a.

5. Where goods are ordered of a manufacturer for exportation, and the purchaser has no opportunity of seeing them before they are shipped, there is an implied undertaking on the part of the former that they are of a merchant-

able quality. *Laing and another* v. *Fidgeon and another*, 4 Campb. 169. Gibbs, C. J. 1815.

6. Upon a written contract for goods of a particular denomination, which the purchaser has no opportunity of inspecting, the law implies a warranty of a saleable article answering the description in the contract, but not that the goods shall correspond with a sample shewn to the buyer, but not mentioned in the contract. *Gardiner* v. *Gray*, 4 Campb. 144. Ellenborough, C. J. 1815.

S. P. *e converso*, ante, VENDOR AND PURCHASER, pl. 52.

7. A servant employed to sell a horse has an implied incidental authority to give a warranty of soundness; such a warranty being now usual. *Alexander* v. *Gibson*, 2 Campb. 555. Ellenborough, C. J. 1811.

S. P. *Pickering* v. *Busk*, 15 East, 38, 45; Sed vide *Truswell* v. *Middleton*, 2 Roll. Rep. 269, 270, contra. And see *Strode* v. *Dyson*, 1 Smith, 400.

8. The declaration of a servant employed to sell a horse, is evidence to charge the master with a warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. *Helyear* v. *Hawke*, 5 Esp. 72. Ellenborough, C. J. 1803.

And see *Biggs* v. *Lawrence*, 3 T. R. 454; post, WITNESS, A. (c).

9. Where a *public* act of Parliament authorizes the granting of redeemable annuities, the purchaser cannot object that the conditions of sale were silent as to the power of redemption. *Coverley* v. *Burrell*, 2 Stark. 295. Ellenborough, C. J. 1817.

A. (b) *Warranty, when broken.*

10. A horse labouring under a temporary lameness, occasioned by accident, and capable of being speedily removed, is not unsound. Therefore an averment in a declaration, of a general warranty of soundness, is supported by evidence of a warranty made with a particular exception of such temporary injury. *Garment* v. *Barrs*, 2 Esp. 673. Eyre, C. J. 1798.

11. In an action upon the warranty of a horse, it is not enough to shew that he is a *roarer*, as this may be merely a bad habit, or proceed from other causes unconnected with his general health and activity. To prove a breach of warranty, the roaring must be shewn to be symptomatic of disease or infirmity in the particular case. *Bassett* v. *Collis*, 2 Campb. 523. Ellenborough, C. J. 1810.

12. But an infirmity rendering the horse less fit for present use or convenience, though not of a permanent nature, although removed after an action brought, is an unsoundness. *Elton* v. *Jordan*, 4 Campb. 281, 1 Stark. 127. Ellenborough, C. J. 1815.

13. And it having been proved that roaring is a disorder of such a nature, as to incommode a horse very much when pressed to his speed, it was held to be an unsoundness. *Onslow* v. *Eames*, 2 Stark. 81. Ellenborough, C. J. 1817.

14. It has been held that an incipient crib-biting is no breach of a general warranty. *Broennenburgh* v. *Haycock*, Holt 630. Burrough, J. 1817.

A. (c) *Remedy in case of breach of warranty.*

15. The vendee of a warranted horse, which proves to be unsound, cannot recover the expenses incurred in keeping the horse, unless he offer to return the horse before he brings the action. *Caswell* v. *Coare*, 2 Camp. 82. Mansfield, C. J. 1809.

And the court of C. P. reduced a verdict in which the keep had been included, contrary to the chief justice's direction; 1 Taunt. 566.

And see ante, VENDOR AND PURCHASER, pl. 75; post, APPENDIX.

16. If a warranted horse be kept a considerable time after the discovery of a defect, and be sent back in a worse state than he was in at the time the discovery was made, the vendee is liable for the full price, and must resort to a cross action for the breach of warranty. *Curtis* v. *Hannay*, bart. 3 Esp. 82. Eldon, C. J. 1800.

And see Dig. 21, 1, 25; *Geddes* v. *Pennington*, 2 Dow, 159.

17. Where, by the conditions of sale, a horse is to be returned within two

days, if he prove unsound, he cannot be returned after the expiration of that period, although the auctioneer may not have paid over the price to his employer. *Mesnard* v. *Aldridge*, 3 Esp. 99. Kenyon, C. J. 1801.

18. A party sued on a warranty of a horse, may call a prior vendor, who sold with a warranty, to prove the animal sound. *Briggs* v. *Crick*, 5 Esp. 99. Alvanley, C. J. 1804.

19. A warranty of the soundness of a horse sold, requires no stamp, it being an agreement "*relating* to the sale of goods." *Skrine* v. *Elmore*, 2 Campb. 407. Ellenborough, C. J. 1811.

20. S. P. said to have been ruled in *Brown* v. *Frye*, *Ibid.* Lawrence, J. Devon, 1809.

21. A party who exchanges a watch for goods falsely warranted to be silver, cannot maintain trover for the watch, without shewing fraud. *Emanuel* v. *Dane*, 3 Campb. 299. Ellenborough, C. J. 1812.

Acc. *Power* v. *Wells*, Dougl. 24 n.

And see ante, A. (a) pl. 3, 4; Bills and notes, pl. 46, 53; *Cooke* v. *Munstone*, 1 N. R. 151.

22. It is no defence in an action upon an express warranty that, according to the custom of the trade, the plaintiff might, within a limited time, have rejected the article. *Yeats and another* v. *Pim and another*, Holt, 59. Heath, J. 1815.

23. In a declaration for not completing a purchase, the vendor need not set out a warranty contained in the particulars of sale respecting a collateral matter. But at the trial, such warranty must be shewn to have been complied with. *Thomson* v. *Miles*, 1 Esp. 184. Kenyon, C. J. 1794.

24. A warranty that an article is of particular description need not be proved otherwise than by the description in the invoice. *Bridge* v. *Wain*, 1 Stark. 504. Ellenborough, C. J. 1816.

B. Warranty of contingent events.

See ante, Agreement, A. (b); Frauds, statute of, D; Insurance, G; Merger, pl. 1; Vendor and purchaser, pl. 51.

WASTE.

A. What shall be.

B. Pleadings.

A. What shall be waste.

1. An action of trespass, or on the case, will lie for voluntary waste done after the expiration of a notice to quit. *Burchell* v. *Hornsby*, 1 Campb. 360. Ellenborough. C. J. 1808.

2. Tenant from year to year cannot be required to make *substantial* repairs; he is, however, bound to keep the premises in tenantable condition. *Ferguson* v. ——, 2 Esp. 590. Kenyon, C. J. 1799.

And see Co. Litt. 54, b.; Ib. 57, a; 1 Saund. 323, a. (n) 7; *Jones* v. *Hill*, 7 Taunt. 392; 3 Tho. Co. Litt. 239.

3. *Dutch barns* erected by the tenant may be removed; and *semble*, that he is not prevented from so doing by an express covenant to leave all *buildings* which should be erected during the term. *Dean* v. *Allalley*, 3 Esp. 11. Kenyon, C. J. 1799.

See this case observed upon in *Elwes* v. *Maw*, 3 East, 47.

And see *Naylor* v. *Collinge*, 1 Taunt. 19; *Penton* v. *Robert*, 2 East, 88; *Culling* v. *Tuffnal*, Bull. N. P. 34.

4. An action will lie against a tenant of garden ground, for ploughing up strawberry beds, although it may be usual for the incoming tenant to pay the outgoing tenant an appraised value, and the tenant may have paid the former occupier accordingly. *Watherell* v. *Hawells*, 1 Campb. 227. Ellenborough, C. J. 1808.

And see *The Keepers &c. of Harrow School* v. *Alderton*, 2 Bos. & Pul. 86.

B. Pleadings.

5. In action for waste, remainder man in tail *male*, declared as entitled to a remainder "in tail, to wit, to him and the heirs of his body," and was nonsuited. *Hardwick* v. *Thompson*, 2 Wms. Saund. 252, c. Thompson, B. Gloucester, 1799.

And see *Ewer* v. *Moile*. Yelv. 140, 1.

WATERCOURSE.

1. Twenty years exclusive enjoyment of a run of water issuing from the ground on the plaintiff's premises, gives him an absolute right, even where no grant can in fact be presumed, the course of the water under the defendant's close having been recently discovered. * *Balston* v. *Bensted*, 1 Campb. 463. Ellenborough, C. J. Maidstone, 1808.

Acc. *Bealey* v. *Shaw*, 6 East, 208, 15; S. C. 2 Smith, 321; 2 Saund. 175, a.

And see, *Eldridge* v. *Knott*, Cowp. 214, 5; *Campbell* v. *Wilson*, 3 East, 294; *Weld* v. *Hornby*, 7 East, 195, 9; S. C. 3. Smith, 244; *Daniel* v. *North*, 11 East, 372; *Rees* v. *Lloyd*, Wightw. 123, 9.

2. Where defendant prescribes for a water-course, and the plaintiff traverses the course of the stream, a party claiming an easement which depends upon the course of the water, is not a competent witness. *Jebb* v. *Povey*, 1 Esp. 679. Kenyon, C. J. 1798.

3. *Secus*, where issue is taken on the right to the easement in the occupiers of a particular tenement. *Ibid.*

WAY.

(And see ante, Action, pl. 7, 13; Action on the case, C. (a); Tithes, pl. 5; Watercourse.)

1. A right of way for agricultural purposes, will not entitle the party to use it in respect of a lime quarry newly opened. *Jackson* v. *Stacey*, Holt, 455. Wood, B. York. 1816.

2. Where the borders of a wide road have been generally treated as waste land, and used as portion of a neighbouring common, the owner of the adjoining inclosures, cannot rely upon his presumptive right to the soil *usque ad filum viæ*, but must produce some evidence of property, or act of ownership. *Headlam* v. *Hedley*, Holt, 463. Bayley, J. Durham, 1816.

WHARFINGER.

(And see ante, Bailment; Carrier; Stoppage in transitu, pl. 11, 18, 20, 21.)

A. Liabilities of.

1. Wharfingers with whom goods are deposited as in a warehouse, are not liable for a loss by fire. *Sidaways* v. *Todd*, 2 Stark. 400. Abbott, C. J. 1818.

2. Although they charge rent for a particular room, out of which the property is removed for their own convenience, *comme semble. Ibid.*

3. But if they have effected an insurance on the goods, and recovered the amount, they are liable for money had and received to the use of the owner. *Ibid.*

4. And a wharfinger who conveys goods to vessels from his wharf, is liable as a common carrier. *Maving* v. *Todd. and others*, 1 Stark. 72. Ellenborough, C. J. 1815.

5. A hoyman using a particular wharf is not discharged by a delivery to the wharfinger. His responsibility continues until the goods reach the consignee, *Wardell* v. *Mourillyan.* 2 Esp. 693. Kenyon, C. J. 1798.

6. Where it is the custom of wharfingers when goods are to be forwarded coastwise, not to ship them or charge for shipping, but to deliver them to the mates of the coasters, the responsibility of the wharfinger ceases with the delivery to the mate, though the goods are lost before they are carried off the wharf. *Cobban and another*, v. *Downe*, 5 Esp. 41. Ellenborough C. J. 1803.

7. A delivery at a wharf to an unknown person found there, is not sufficient to charge the wharfinger. *Buckman* v. *Levi*, 3 Campb. 414. Ellenborough, C. J. 1813.

And see ante, Tender, pl. 4. 37.

WITNESS.

A. Attendance of witnesses.
(a) Penalty for non-attendance.
(b) List of witnesses.
(c) Protection of witnesses.
(d) Remedy for expenses.
(e) Where evidence of declarations admissible.

B. Persons privileged from examination.
(a) Husband and wife.
(b) Arbitrator.
(c) Barrister.
(d) Attorney.
(e) Members of parliament.
(f) Public officers.
(g) Parties.

C. Interest.
(a) Bail.
(b) Bankruptcy, in questions of.
(c) Bills and notes, in cases upon.
(d) Creditors.
(e) Executors.
(f) Informers.
(g) Owners of stolen property.
(h) Parishioners.
(i) Partners and joint trespassers.
(k) Privies in estate.
(l) Servants.
(m) Ship-owners and masters.
(n) Trustees.
(o) In other cases.
(p) Objection, when taken.
(q) How repelled.
(r) Competency, how restored.

D. Personal defect.
(a) Crime.

E. Examination of witnesses.
(a) Oath, how administered.
(b) Declarations in articulo mortis.
(c) Questions affecting the witness personally.
(d) Repudiation of evidence.
(e) Cross examination.
(f) Leading questions.
(g) Assistance of papers.

F. Production of papers.

G. Subscribing witness.

A. Attendance of witnesses.

A. (a) *Penalty for non-attendance.*

1. No action lies against a witness for not attending upon a *subpœna*, unless the cause were called on, and the jury sworn. *Bland* v. *Swafford*, Peake, 60. Kenyon, C. J. 1791.

See *Hallett* v. *Mears*, 13 East, 15.

2. *Semble*, that the name of a witness inserted in the copy of the subpœna at the time of the service may be inserted in the original, when the witness is called upon this subpœna. *Wakefield* v. *Gall*, Holt, 526. Gibbs, C. J. 1817.

A. (b) *List of witnesses.*

3. The list of witnesses given, under 7 Ann. cap. 21. s. 14. to a person indicted for high treason, properly describes a party as *lately* of such a place. *Rex* v. *James Watson*, 2 Stark. 116, at the bar of the court of K. B. 1817.

4. But if, on the *voir dire*, he appears to have had a later residence, and no endeavour has been made to trace him, he cannot be examined. *Ib.*

A. (c) *Protection of witnesses.*

5. Witness in attendance in town, arrested for debt, should obtain a habeas corpus, returnable before a judge at chambers *ex parte*. *Tillotson*, 1 Stark. 470. Ellenborough, C. J. 1816.

A. (d) *Remedy for expenses.*

6. Assignees may be sued for expenses of witness after allowance by the commissioners. *Yarker* v. *Botham et alt.* 1 Esp. 64. Kenyon, C. J. 1793.

7. Though witness be a creditor. *Ib.*

8. And, the proceedings under the commission need not be produced. *Ib.*

A. (e) *Where declarations admissible.*

(See ante, AGENT, pl. 64; EVIDENCE, 247, 9, 250, 1, 263, 275, 80, 1, 300, 1, 2; post. pl. 82; E. (b)).

9. In an action for contribution against a co-surety, a declaration by the obligee as to the account to which he carried money paid him by the principal obligor is not evidence, unless the declaration were made at the time of payment, the obligee must be called. *Dunn* v. *Slee*, Holt, 399.[a] Park, J. 1816.

10. In trespass against A. for entering premises under pretence of a warrant to search, evidence may be given of what was said by B., a joint trespasser to induce A. to join in the trespass. *Goding* v. *Cill.* Ellenborough, C. J. Sittings after M. T. 1817.

11. The debtor sends money to the house of the creditor. A servant takes it in, and returns it with an answer, purporting to be from the master. This is evidence to go to a jury. *Anonymous*, 1 Esp. 349. Kenyon, C. J. 1795.

See *Pilkington* v. *Hastings*, 5 Co. 76; S. C. better reported, Cro. El. 813.

B. PERSONS PRIVILEGED FROM EXAMINATION.

B. (a) *Husband and wife.*

(Post, 54, 138, 146, 194; Co. Litt. 66.)

12. Husband *de facto* may prove the marriage illegal, and bastardize the issue. *Standon* v. *Standon and another*, Peake, 32. Kenyon, C. J. 1791.

And see *Standen* v. *Edwards*, 1 Ves. Jun. 133, 4; Dig. 22, 3, 29, 1.

13. Admission by wife of a debt arising out of a transaction conducted by her as agent to her husband, is evidence against him. *Emerson* v. *Blonden*, 1 Esp. 142. Kenyon, C. J. 1794.

14. S. P. ruled in *Palethorp* v. *Furnish*, 2 Esp. 511, n. Buller, J. 1783.

Sed vide *Hall* v. *Hill*, 2 Stra. 1094.

15. In an action by husband and wife for money due to the latter *dum sola*, an acknowledgment by her since the marriage, that the demand is unfounded, is inadmissible. *Kelly and wife* v. *Small*, 2 Esp. 716. Kenyon, C. J. 1799.

16. Plaintiff in replevin may examine the wife of the person under whom the defendant makes cognizance. *Johnson* v. *Mason*, 1 Esp. 89. Kenyon, C. J. 1794. Post, pl. 176.

B. (b) *Arbitrator.*

17. Where a cause is referred, and the arbitrator is empowered to examine the parties and inspect their books, he cannot disclose the result either of the examination or of the inspection, at a subsequent trial between the same parties. *Habershon* v. *Trotter*, 3 Esp. 38. Kenyon, C. J. 1799.

B. (c) *Barrister.*

18. A barrister cannot be required to prove that a motion has been made by him, or upon what statement such motion was grounded. *Curry* v. *Walter*, 1 Esp. 457. Eyre, C. J. 1795.

Sed vide March 83, pl. 136.

B. (d) *Attorney.*

(And see Bunb. 288, pl. 369.)

19. A communication made by client to attorney through the medium of an interpreter, cannot be disclosed by the latter. *Du Barré* v. *Livette*, Peake, 77. Kenyon, C. J. 1791.

20. Though the cause, in respect of which the communication was made, be at an end. *Ibid.*

Acc. *Wilson* v. *Rastall*, 4 T. R. 753, 9.

21. But the privilege does not extend to facts communicated to the interpreter in the absence of the attorney. *Ibid.*

Acc. *Wilson* v. *Rastall*, ubi supra.

And see Bull. N. P. 284, 5.

22. An attorney may be called to prove usury in a loan negotiated by him. *Duffin* v. *Smith*, Peake, 108. Kenyon, C. J. 1792.

Acc. Bull. N. P. 284, 5.

Sed vide Anon. 1 Lord Raym. 733; S. C. Bull. N. P. 284.

23. Held, that an attorney cannot be called upon to acknowledge the receipt of a notice to produce papers. *Read* v. *Passer*, 1 Esp. 216. Kenyon, C. J. 1794.

Sed vide *Spenceley* v. *Schulenburgh*, 7 East, 357; S. C. 3 Smith, 325.

24. And although he has a deed in his pocket, he is not bound to produce it, unless a proper notice has been served. *Doe* d. *Wartney* v. *Grey*, 1 Stark. 283. Ellenborough, C. J. 1816.

25. The defendant's attorney may be called to prove an admission of the debt made by him to the plaintiff by the direction of his client. *Turner* v. *Railton*, 2 Esp. 474. Kenyon, C. J. 1796.

26. In an action against the sheriff for an escape, the attorney for the original defendant is not bound to answer any question relative to communications made to him by his client in the former cause. *Sloman, executrix*, v. *Herne, knt. et alt. sheriffs of London*, 2 Esp. 695. Kenyon, C. J. 1799.

27. A letter written by an attorney to his client, and indorsed by the latter, is evidence against him. *Meyer's assignees* v. *Sefton and others*, 2 Stark. 274. Holroyd, J. 1817.

28. *Semble*, that an attorney cannot be called upon by the plaintiff to divulge any matters which he acquired the knowledge of when employed by both plaintiff and defendant. *Robson and another, assignees of Blakey*, v. *Kemp and another*, 4 Esp. 233. Ellenborough, C. J. 1802.

29. Where an attorney is a subscribing witness to a deed executed by his client, he is bound to state all that passed at the time relating to the execution of the instrument but not what took place in the course of the preparation of the deed. *Robson and another, assignees of Blakey*, v. *Kemp and another*, 5 Esp. 52. Ellenborough, C. J. 1803.

S. P. *Sandford* v. *Remington*, 2 Ves. 189.

And see *Bowles* v. *Stewart*, 1 Sch. & Lef. 209, 226; *Bicknell* v. *Keppel*, 1 N. R. 21; *Leith* v. *Post*, post, G. pl.

30. A person who becomes acquainted with a transaction merely through the circumstance of his having been employed as attorney, cannot be called upon to disclose it, though not communicated to him by his client. *Ibid.*

But see *Spenceley* v. *Schulenburg*, 7 East, 357; S. C. 3 Smith, 325.

31. But a communication which a party makes to an attorney whom he has ceased to employ, respecting a business formerly transacted for him by such attorney, is not privileged. *Ibid.*

And see *Cobden* v. *Kendrick*, 4 T. R. 431.

32. An attorney cannot disclose the particulars of a written instrument, the knowledge of which he has acquired by the delivery of such instrument to him by his client. *Brard* v. *Ackerman*, 5 Esp. 120. Ellenborough, C. J. 1804.

33. In an action between A. and B. the solicitor of C. may be called upon to produce C.'s title-deeds in his possession. *Copeland* v. *Watts and another, executors of Gubbins*, 1 Stark. 95. Gibbs, C. J. 1816.

34. But the court will not permit them to be read to C.'s prejudice. *Ibid.*

35. A person to whom the defendant, under a mistaken supposition of his being an attorney, has acknowledged the cause of action, is bound to give evidence of such admission. *Fountain administrator*, v. *Young*, 6 Esp. 113. Mansfield, C. J. 1807.

36. B. being indebted to A. directs an attorney to carry certain proposals to A. with respect to his demand. Such attorney cannot disclose what passed between his client and himself on the occasion, though no suit was commenced for several months afterwards. *Gainsford* v. *Grammar*, 2 Campb. 9. Ellenborough, C. J. 1809.

See *Wilson* v. *Rastall*, 4 T. R. 753.

37. But where the attorney refuses to be examined, declarations made by him are evidence against his client. *Ibid.*

And see *Vaillant* v. *Dodomead*, 2 Atk. 524; ante EVIDENCE, pl. 299, 301.

38. An attorney is not at liberty to disclose what is communicated to him confidentially by a client, although the latter be not in any shape before the court. *Rex* v. *Withers and others*, 2 Campb. 579. Ellenborough, C. J. 1811.

Sed vide *Madock* v. *Madock*, 1 Ves. 262; *Bishop of Winton* v. *Fournier*, 2 Ves. 446.

39. And, therefore, where the prosecutor has given evidence upon an indictment for forcibly entering his house, the attorney cannot be called to prove that the prosecutor, upon consulting him, gave a different account of the transaction,

or that a third person, who then accompanied the prosecutor, *in his hearing*, represented the house as his own. *Ibid.*

40. The agent of the defendant's attorney cannot be examined as to communications with the defendant on the subject of the action. *Parkins* v. *Hawkshaw*, 2 Stark. 239. Holroyd, J. 1817.

41. Where the witnesses on both sides are ordered out of court, and the attorney for the prosecution remains in court, he cannot be examined for the crown. *Rex* v. *Webb*. Best, J. Sarum Summer Assizes, 1819.

42. And the prisoner's counsel, on the suggestion of the court, retracted his consent to waive the objection. *Ibid.*

B. (e) *Members of Parliament.*

(See PARLIAMENT.)

B. (f) *Public officers.*

43. A colonial attorney-general is not bound to disclose communications of a public or private nature made to him by the governor of a province. *Wyatt* v. *Gore*, Holt, 299. Gibbs, C. J. 1816.

B. (g) *Parties.*

44. One of two lessors in ejectment by several demises, cannot, though he has no interest in the premises, be required to impeach the title of the other lessors. *Fenn, on the several demises of Pewtress and Thompson,* v. *Granger*, 3 Campb. 177. Ellenborough, C. J. 1812.

45. But the objection may be waived. *Ibid.*

And see *Norden* v. *Williamson*, 1 Taunt. 378.

C. INTEREST.

C. (a) *Bail.*

46. It is no objection to the competency of a witness that he was bail *to the sheriff*. *Piesley* v. *Von Esch*, 2 Esp. 604. Kenyon, C. J. 1797.

47. And the production of the bail bond will not raise the presumption that the witness is bail *to the action*. *Ibid.*

48. But where an attachment against the sheriff has been set aside, upon condition that it shall remain as a security, the bail below cannot be examined. *Ibid.*

And see *Brown* v. *Neave*, Wightw. 406.

C. (b) *Upon questions of bankruptcy.*

49. A bankrupt, who, under a second commission, has not paid 15s. in the pound, cannot be examined for the assignees, after obtaining his certificate and releasing his allowance and surplus. *Kennett and another, assignees,* v. *Greenwollers, one, &c.* Peake, 3. Kenyon, C. J. 1790.

S. C. 2 Esp. D. N. P. 99; S. C. not S. P. 1 Suppl. Vin. Abr. 575, 6.

50. A creditor releasing to the assignees, is a good witness to prove the act of bankruptcy. *Koopes* v. *Chapman and another*, Peake, 19. Kenyon, C. J. 1790.

S. P. *Ambrose* v. *Clendon*, Cas. temp. Hardwicke, 267; and see *Granger* v. *Furlong*, 2 Bla. 1273.

51. A bankrupt released by his surety, may be called by the surety, without a release from his assignees. *Cartwright* v. *Williams*, 2 Stark. 342. Ellenborough, C. J. 1818.

52. Where two persons claim under demises from A. who has since become a bankrupt, A. after releasing his allowance and surplus, is a competent witness to prove, that the premises in dispute were not included in the first lease. *Longchamps* d. *Evitts* v. *Fawcett*, Peake, 71. Kenyon, C. J. 1791.

53. But it was said that A. would have been incompetent if he had been still interested in the reversion. *Ibid.*

See the distinctions taken in *Bell* v. *Harwood*, 3 T. R. 308.

And see *Griffin* v. *Archer*, 2 Anst. 478; *Selby* v. *Crew*, *ibid.* 504.

54. Bankrupt's wife was admitted to prove, that a payment was made in contemplation of bankruptcy. *Jourdain, assignee of Nowlan,* v. *Lefevre and others*, 1 Esp. 66. Kenyon, C. J. 1793.

N. It is stated that the witness was considered to stand indifferent with respect to her husband's allowance. Unless, however, the estate paid 20s. in the pound, the defendants, the favoured creditors, would not reduce the fund by their proof, in the proportion in which a recovery against them would increase it.

55. In an action by indorsee of a note against the maker, the indorser, an uncertificated bankrupt, is a good witness for the latter, notwithstanding the probability of his obtaining his certificate. *Sikes and others* v. *Marshall*, 2 Esp. 705. Kenyon, C. J. 1798.

56. A bankrupt is a good witness to *disprove* an act of bankruptcy. *Oxlade* v. *Perchard et alt., sheriffs of London*, 1 Esp. 287. Kenyon, C. J. 1795.

57. But a bankrupt cannot be examined respecting an equivocal act of bankruptcy, whether called for the purpose of supporting or negativing it. *Hoffman, assignee of Phelps*, v. *Pitt*, 5 Esp. 22. Ellenborough, C. J. 1803.

58. In an action by indorsee against acceptor, the drawer, who has given a counter security to the acceptor, and is become bankrupt, is not a competent witness for the defendant without a release. *Pinkerton* v. *Adams and Milner*, 2 Esp. 611. Kenyon, C. J. 1797.

Sed vide 49 Geo. 3. cap. 121, sect. 8.

59. A creditor to whom a bankrupt before he obtains his certificate, promises payment in full, is not a competent witness to support a second commission. *Roberts, assignee of Robertson*, v. *Morgan*, 2 Esp. 736. Eyre, C. J. 1799.

60. One joint defendant who pleads bankruptcy, is not a competent witness for other defendants who plead *non assumpsit*. *Raven et alt.* v. *Dunning and Chilton*, 3 Esp. 25. Kenyon, C. J. 1799.

And see *Emmett* v. *Bradley*,* 1 B. Moore, 332.

S. C. differently reported, Peake, Evid. App. lxxxvii.

61. And the court would not permit a verdict to be recorded in favour of the bankrupt, for the purpose of enabling him to give evidence. *Currie* v. *Child, Pritchard and Brown*, 3 Campb. 283. Ellenborough, C. J. 1812.

N. But where the plaintiff enters a *nolle prosequi* as to the bankrupt, such evidence is admissible. *M'Iver* v. *Humble*, 16 East, 171; Mann. Exch. Pra. 368.

62. In an action for a fraudulent misrepresentation of the circumstances of a person who is since become a bankrupt, the plaintiff may call a creditor of the bankrupt. *Burton* v. *Lloyd*, 3 Esp. 207. Kenyon, C. J. 1800.

63. If a certificate is impeached on the ground that it was signed by persons who had proved fictitious debts, these persons may be examined as to the actual state of their accounts, and indirect evidence arising from their books is inadmissible. *Edmonstone* v. *Webb*, 3 Esp. 264. Kenyon, C. J. 1801.

64. *Semble*, that the declaration of a trader respecting an equivocal act of bankruptcy, not made at the time or forming part of the *res gestæ*, though made before the issuing of the commission, is not evidence. *Robson and another, assignees of Blakey*, v. *Kemp and another*, 4 Esp. 233. Ellenborough, C. J. 1802.

65. A bankrupt, though he has obtained his certificate and released his surplus, cannot be asked any question connected with the act of bankruptcy, upon which he was declared a bankrupt, or with any prior act of bankruptcy, either upon his examination in chief or when cross-examined. *Wyatt, assignee of Algar*, v. *Wilkinson and another*, 5 Esp. 187. Chambre, J. 1805

S. P. *Elsom* v. *Bradley*, Selw. 239.

And see *Field* v *Curtis*, 2 Stra. 829. *Chapman* v. *Gardner*, 2 H. Bl. 279. *Ambrose* v. *Clendon*, Cas. temp. Hardw. 287.

66. Where persons are convicted of a conspiracy to prevent a bankrupt from obtaining his certificate, the conviction is not evidence in an action brought against them by the bankrupt for the same conspiracy; as it *may have proceeded* partly on the testimony of the latter. *Hathaway* v. *Barrow and others*, 1 Campb. 151, 180, d. Mansfield, C. J. 1807.

67. Where, in an action by the payee against the drawer of a bill, the acceptor is called on the part of the defendant, and is objected to on the ground that he is a *certificated* bankrupt, and therefore liable to the defendant though not to the plaintiff, a release from the defendant will restore his competency. *Scott and others* v. *Lifford*, 1 Campb. 249. Ellenborough, C. J. 1808.

68. Payee of an accommodation note became bankrupt, and obtained his certificate. Held, that he could not be

called to prove that he had received value from the indorsee. *Maundrell* v. *Kennett*, 1 Campb. 408, n. Bayley, J. 1809.

69. Held, that a creditor who has not proved, is a competent witness to support the commission. *Williams* v. *Stevens*, 2 Campb. 301. Ellenborough, C. J. 1809.

S. P. Contra. *Ralph Adams and others* v. *Malkin and another*, 3 Campb. 530. Gibbs, C. J. 1814.

And see *Shuttleworth* v. *Bravo*, 1 Stra. 507. *Granger* v. *Furlong*, 2 Bla. 1273.

Ex parte, Osborne, 1 Rose, 387.

70. Where notice has been given under 49 Geo. 3. cap. 121. s. 10. that the defendant means to dispute the act of bankruptcy, the assignees cannot call the petitioning creditor to prove it, his bond to the chancellor giving him a direct interest in supporting the commission. *Green and others* v. *Jones*, 2 Campb. 412. Ellenborough, C. J. 1810.

And see ante, Bankrupt, pl. 74.

71. But he may be called on the other side to prove the commission invalid. *Anonymous, cited ibid. and decision said to have been approved by Thurlow*, C.

72. He is even a competent witness to cut down his own debt, on which the commission is founded. *Lloyd and others, assignees of Palmer a bankrupt*, v. *Stretton*, 1 Stark. 40. Ellenborough, C. J. 1815.

73. To shew the solvency of a party at a particular time, a witness may state the general result of an examination of his books. Anon. per Lord Kenyon, cited by Holroyd, J. in *Meyer's assignees* v. *Sefton and others*, 2 Stark. 276.

74. So, to shew the value of property assigned by a trader. *Meyer's assignees*, v. *Sefton and others*, 2 Stark. 276. Holroyd, C. J. 1817.

75. The result of accounts rendered by the bankrupt to his assignees, may be given in evidence for such a purpose. *Ibid.*

76. Upon an issue whether A. had the disposition of property, after the execution of a deed of settlement, any act of dominion exercised by A. is evidence, although the parties were not privy to it. *Ibid.*

77. But an assignment executed without the privity of the trustees, or of the cestui que trust, is not evidence, unless acted upon and possession delivered. *Ibid.*

78. In an action for penalties on 5 Geo. 2. cap. 30. s. 21. the examination of the defendant before the commissioners, is admissible to shew that he has secreted effects of the bankrupt, though he might have demurred to the inquiry. *Smith and others, assignees of Parquet* v. *Beadnell*, 1 Campb. 30. Ellenborough, C. J. 1807.

79. So any acknowledgment extracted from a party by the commissioners, however irrelevant to the bankruptcy, may be used against him. *Stockfleth* v. *De Tastet and others*, 4 Campb. 10. Ellenborough, C. J. 1814.

80. But *semble*, that the chancellor would order such examination to be taken off the file. *Ibid.*

81. B.'s goods are taken in execution after an act of bankruptcy, at the suit of A., with whose assent they are assigned by the sheriff to C.; A.'s examination under the commission cannot be read in an action by the assignees against C., for the purpose of shewing A.'s knowledge of B.'s insolvency at the time of the execution. *Deady and another, assignees of Ganson* v. *Harrison*, 1 Stark. 60. Ellenborough, C. J. 1815.

82. But an examination taken before the assignment would have been admissible. *Ibid.*

83. Where, in an action for a false return of nulla bona, the defence rests on the validity of a commission of bankrupt overreaching the levy, and the defendant is indemnified by the assignees, the plaintiff may give in evidence an admission made by one of the assignees, that the plaintiff did not owe him 100l. *Dowden* v. *Fowle, Esq. sheriff of Wilts*, 4 Campb. 38. Dampier, J. 1814.

Acc. *Dyke* v. *Aldridge*, 7 T. R. 665.

84. A person resident in Newfoundland, who has received dividends as a creditor upon the estate of an insolvent there, taking the benefit of the act Geo. 3. cap. may be called on the part of the insolvent sued by another creditor, to prove the hand-writing of the chief justice to the allowance of his certificate

and the seal of the court. *Compton* v. *Killegrew*, Holroyd, J. Exeter Spring Assizes, 1819.

C. (c) *In cases upon bills and notes.*

85. In an action by indorsee of note against maker, the indorser may prove it paid. *Charrington* v. *Milner*, Peake, 6. Kenyon, C. J. 1790.

S. P. *Birt* v. *Kershaw*, 2 East, 458. recognized by Grant, M. R. in *Paul* v. *Administrator of Hamilton*. Selw. N. P. 377.

86. Ruled, that the drawer of a bill is not a competent witness to invalidate the acceptance. *Phetheon* v. *Whitmore*, Peake, 40. Buller, J. 1791.

87. But in a subsequent case it was ruled, that the drawer is a good witness even to prove the bill void *ab initio*. *Adams* v. *Lingard and another*, Peake. 117. Kenyon, C. J. 1793.

N. And the admissibility of such evidence, where the party is not interested, is settled in *Jordaine* v. *Lashbroke*, 7 T. R. 601.

88. Held, that a person who has indorsed a bill is not a competent witness to impeach the security to which he has given credit. *Hart* v. *M'Intosh*, 1 Esp. 298. Buller, J. 1795.

N. This point was ruled on the authority of *Walton* v. *Shelly*, 1 T. R. 296, which has been overruled by *Jordaine* v. *Lashbrooke*, 7 T. R. 601.

89. In an action by indorsee against the acceptor, the drawer may prove payment by himself. *Humphrey* v. *Moxon*, Peake, 52. Kenyon, C. J. 1791.

90. Except, *perhaps*, where it appears that the witness has had due notice of the dishonour of the bill. *Ibid.*

91. In an action by indorsee against acceptor, the indorser, though released by the defendant, cannot be called to prove, that he delivered the bill to the plaintiff merely for the purpose of procuring payment as agent for the witness. *Buckland* v. *Tankard*, 1 Esp. 85. Kenyon, C. J. 1794.

And the court of K. B. discharged a rule for setting aside verdict for the plaintiff. *Ibid.* and 5 T. R. 578.

Sed vide *Birt* v. *Kershaw*, 2 East, 458, 61. *Paul* v. ——, *administrator of Hamilton*, Selw. N P. 377.

92. A. the drawer of a bill, delivers it to B. to be discounted: B. delivers it to his creditor C.: in an action by C. against A., B. cannot be called to prove, that the bill was delivered to C. for a special purpose, without a release from A., to whom he would be liable for the costs of C.'s action. *Harman* v. *Lasbrey*, Holt, 390. Gibbs, C. J. 1816.

93. In an action by indorser against drawer, the acceptor may be called to prove, that he had no effects of the defendant. *Staples* v. *Okines*, 1 Esp. 332. Kenyon, C. J. 1795.

94. In an action by the indorsee of a note against the maker, the payee is a competent witness for the latter. *Cooper* v. *Davies*, 1 Esp. 463. Kenyon, C. J. Hereford, 1795.

95. Indorser of a note, who is an uncertificated bankrupt, is a competent witness for the maker. *Sikes and others* v. *Marshall*, 2 Esp. 705. Kenyon, C. J. 1798.

96. But the drawer of a bill, giving a counter security to the acceptor and becoming bankrupt, is not a competent witness for the acceptor without a release. *Pinkerton* v. *Adams and Milner*, 2 Esp. 611. Kenyon, C. J. 1797.

Sed vide 49 Geo. III. cap. 121. sect. 8.

97. The drawer of a bill who is suspected of having forged the acceptance, may be called to prove the hand-writing of the drawee. *Dickinson* v. *Prentice*, 4 Esp. 32. Kenyon, C. J. 1801.

98. The defence being a gaming consideration, B., the drawer was called by defendant. It was objected that he is interested to defeat plaintiff, being liable for treble penalty if he recover, but not if he fail. Held, that the witness was competent, since, if plaintiff failed, B. was liable to him; if he succeeded, B. might deliver himself from the penalties, by refunding within the time. *Hubner* v. *Richardson*. Holroyd, J. Sittings after E. T. 1818.

99. The drawer of a bill may be called to prove usury in discounting it, in an action against the acceptor. *Brard* v. *Ackerman*, 5 Esp. 119. Eldon, C. J. 1804.

100. But he must be released by the defendant. *Rich and another* v. *Topping*, Peake, 224, and 1 Esp. 177. Kenyon, C. J. 1794.

101. In an action by payee against acceptor, the drawer is admissible to prove that the bill has been discharged by an executed agreement. *Pool* v. *Bousfield*, 1 Campb. 55. Ellenborough, C. J. 1807.

And see *Ilderton* v. *Atkinson*, 7 T. R. 481; *Birt* v. *Kershaw*, 2 East, 458.

102. But where the acceptor had become bankrupt, and had obtained his certificate, he was held to be a good witness for the defendant upon being released by him. *Scott and others* v. *Lifford*, 1 Campb. 249. Ellenborough, C. J. 1808.

S. C. not S. P. 9 East, 347.

N. *Semble*, that a release would now be unnecessary. 49 Geo. III. cap. 121. sect. 8.

103. The acceptor cannot be called to prove a set-off, in an action by the holder against the drawer. *Mainwaring* v. *Mytton*, 1 Stark. 83. Dampier, J. 1815.

104. The payee of an accommodation bill is a good witness to prove that he received a valuable consideration from the indorsee, in an action by the latter against the drawer; the interest being equal either way. *Shuttleworth* v. *Stephens*, 1 Campb. 407. Ellenborough, C. J. 1808.

N. In an action against A. upon a note made by A. and B., the latter is a competent witness to prove A.'s signature. *York* v. *Blott*, 5 M. & S. 71.

And see Chitty on Bills.

105. But where the payee of an accommodation note had become bankrupt, and had obtained his certificate, his evidence was held inadmissible, as he would still be liable to the maker. *Maundrell* v. *Kennett*, 1 Campb. 408, n. Bayley, J. 1809.

Sed vide 49 Geo. III. cap. 123.

106. In an action against A. and K., as joint acceptors, K. suffered judgment by default. Defence by A. dissolution of partnership. The drawer being called for defendant, confessed the bill to have been drawn for his own accommodation. Held a competent witness, on the ground that his evidence goes to charge himself in the first instance. *Williams* v. *Keats and another*. Ellenborough, C. J. Sittings after Michaelmas Term, 1817.

107. In an action by indorsee against drawer of a bill, where there is no direct evidence of dishonour, the payee is a competent witness to prove that defendant promised to pay after he knew that time had been given to the acceptor. *Stevens* v. *Lynch*, 2 Campb. 332. Ellenborough, C. J. 1809.

S. C. not S. P. 12 East, 39.

C. (d) *Creditors.*

108. The conusee of a judgment cannot be called to prove that it was obtained *bonâ fide*. *Campion* v. *Bentley, administrator of Bentley*, 1 Esp. 343. Eyre, C. J. 1795.

N. It is not a principal challenge to a juror that he is indebted to plaintiff or defendant. Fra. Moore 3, pl. 6.

109. A creditor who has a power of attorney from the plaintiff, his debtor, to receive to his own use the money to be recovered, is an incompetent witness. *Powel* v. *Gordon*, 2 Esp. 735. Eyre, C. J. 1799.

110. Creditor of intestate is a competent witness for the administratrix. *Paull, administrator of Sutton*, v. *Brown*, 6 Esp. 34. Macdonald, C. B. Horsham, 1806.

And see *Carter* v. *Pearce*, 1 T. R. 163; 12 Vin 206, pl. 7.

111. Unless the estate be insolvent. *Craig, administratrix*, v. *Cundell*, 1 Campb. 381. Ellenborough, C. J. 1808.

C. (e) *Executors.*

112. To support a plea by an executor of a judgment outstanding, the conusee of such judgment cannot be called to negative fraud. *Campion* v. *Bentley, administrator of Bentley*, 1 Esp. 343. Eyre, C. J. 1795.

113. In an action by an administrator to recover the goods of his intestate, a creditor of the estate is a competent witness to prove the property in the articles claimed, notwithstanding the remote interest which he has in increasing the estate. *Paull, administrator*, v. *Brown*, 6 Esp. 34. Macdonald, C. B. Horsham, 1806.

114. But *semble*, that where the estate is insolvent, a creditor cannot be called to support a claim made by the administratrix. *Craig, administratrix*,

v. *Cundell*, 1 Campb. 381. Ellenborough, C. J. 1808.

115. An executor who takes no beneficial interest under the will, is a competent witness, in a collateral action, to prove property in himself as executor. *Wilkes* v. *Lister*, 6 Esp. 78. Ellenborough, C. J. 1806.

116. A residuary legatee is not a competent witness in an action by executrix, after releasing all claim to the debt sued for, as the residuum may be charged with the costs to plaintiff's attorney. *Baker, widow, executrix, &c.* v. *Tyrwhitt*, 4 Campb. 27. Ellenborough, C. J. 1814.

C. (f) *Informer.*

(Vide Co. Litt. 6. b.)

117. Held, that an informer entitled under 17 Geo. II. cap. 40. s. 10. to a moiety of the penalty for embezzling naval stores, is an incompetent witness for the prosecution, unless he will release his interest. *Rex* v. *Blackman*, 1 Esp. 95. Kenyon, C. J. 1794.

118. But in a subsequent case the informer was admitted; it being in the discretion of the court to fine or imprison. *Rex* v. *Cole*, 1 Esp. 169, and Peake, 217. Kenyon, C. J. 1794.

N. See several instances of the exercise of the discretion vested in the courts by these statutes, in *Rex* v. *Bland*, 5 T. R. 370, and notes.

119. The prosecutor of a road indictment is a competent witness, though liable to costs, if proceedings vexatious. *Rex* v. *the Inhabitants of Hammersmith*, 1 Stark. 357. Ellenborough, C. J. 1816.

120. A person entitled to a share of the penalty for exporting machinery is a good witness. *Rex* v. *Teasdall, Grant, and others*, 3 Esp. 68. Kenyon, C. J. 1799.

S. C. cited and approved in *Heward* v. *Shipley*, 4 East, 183; acc. *Rex* v. *Luckup*, Willes, 425, n.; *Rex* v. *M. Johnson, ibid.*

C. (g) *Owner of stolen property.*

121. The original owner is a competent witness to prove the theft of a horse, in an action by the vendee against the seizing officer. *Joseph* v. *Adkins*, 2 Stark. 76. Ellenborough, C. J. 1817.

C. (h). *Parishioners.*

122. A parishioner, liable to be rated, but not actually rated, is a good witness to prove an embezzlement of the rates. *Chivers* v. *Brand*, 1 Esp. 175. Kenyon, C. J. 1794.

Acc. *Rex* v. *Prosser*, 4 T. R. 16; *Rex* v. *Lumley*, 6 T. R. 157; *Rex* v. *Kirdford*, 2 East, 559.

123. A parishioner paying rates, is a competent witness in an action defended by an order of vestry directing the expenses to be defrayed out of the rates, if, upon being informed that such appropriation of the rates cannot legally be made, he state that he has no intention of contributing personally towards the costs of the defence. *Yates* v. *Lance*, 6 Esp. 132. Macdonald, C. B. Maidstone, 1810.

C. (i) *Partners and joint trespassers.*

124. Defendant may call a partner of the plaintiff to prove, that the debt was paid to himself. *Evans* v. *Silverlock*, Peake, 21. Kenyon, C. J. 1790.

125. A father who holds out to the world that his infant son is his partner, may call the son to disprove the partnership in an action brought by himself alone. *Glossop* v. *Colman and others*, 1 Stark. 25. B. R. T. T. 1815. Post, pl. 140.

126. A person who is proved to be a partner with the defendant, is not competent to prove that he, the witness, is alone liable for the particular demand in issue. *Goodacre* v. *Breame*, Peake, 174. Kenyon, C. J. 1793.

127. So where issue was taken upon a plea of nonjoinder, the defendant was not permitted to examine the alleged joint contractor after releasing him. *Young* v. *Bairner*, 1 Esp. 103. Kenyon, C. J. 1794.

But the court granted a new trial on the ground that the release made him competent. *Ibid.*

N. And as to the evidence necessary to support this plea, see *Abbott* v. *Smith*, 2 W. Bla. Rep. 947, 951. 1 Wentworth Plead. 17, 33; *Gould* v.

Barnes, 3 Taunt. 504; *Lucas* v. *Delacour*, 1 M. & S. 149.

128. If the defendant call a witness to prove that the goods for which the action is brought, were furnished on the credit, and for the use, of the latter, the plaintiff cannot, by merely suggesting that the witness is a partner, render him incompetent. *Birt* v. *Hood*, 1 Esp. 20. Kenyon, C. J. 1793.

129. In an action for a tort, one defendant, *who suffers judgment by default*, is a competent witness to prove, that a co-defendant, who has pleaded, is not chargeable. *Ward* v. *Haydon and Ventorn*, 2 Esp. 552. Kenyon, C. J. 1797.

130. S. P. Anon. 2 Campb. 334, n. Wood, B. Lancaster, 1809.

Contra, post. pl. 139. And see F. N. B. 155 A.

131. But he cannot be called by the plaintiff to prove a co-defendant guilty. *Chapman* v. *Graves and others*, 2 Campb. 333, n. Le Blanc, J. Lancaster, 1810.

132. A co-trespasser *not sued*, was held not to be a competent witness to prove the trespass. *Barnard* v. *Dawson*, 2 Campb. 333, n. Kenyon, C. J. 1796.

133. But on a subsequent occasion, such testimony was admitted; and the last case was said never to have been acted upon. *Chapman* v. *Graves*, *ubi supra*.

134. A defendant who pleads bankruptcy, cannot be called by a co-defendant who pleads to the merits. *Raven et alt.* v. *Dunning and Chilton*. 3 Esp. 25. Kenyon, C. J. 1799.

And see ante, C. (b) 60, 61.

135. *Semble*, that a partner of the defendant, who is not sued, is not a competent witness for the defendant, though the latter and the witness execute mutual releases. *Cheyne* v. *Koops*, 4 Esp. 112. Alvanley, C. J. 1802.

136. One of two defendants in ejectment, who has suffered judgment by default, may be called to prove the holding by the other defendant, under the lessor of the plaintiff. *Doe* d. *Harrop* v. *J. Green and G. Green*, 4 Esp. 198. Ellenborough, C. J. 1802.

So one who is named a disseisor in the writ. Co. Litt. 66.

137. A supercargo who was to have had a share in the *profits* of an adventure, is a competent witness for the owner in an action against the underwriters to recover the invoice price of the goods, no insurance having been made on *profits*. *Robertson* v. *French*, 4 Esp. 246. Ellenborough, C. J. 1803.

And see ante, Ship, pl. 145, 6. *Barton* v. *Hanson*, 2 Taunt. 49; *Gouthwaite* v. *Duckworth*, 12 East, 421; *Venning* v. *Leckie*, 13 East, 7; *Coppard* v. *Page*, Forrest, 1.

138. Upon an indictment for a conspiracy, the wife of one defendant cannot be called on behalf of a co-defendant, though the parties appear and defend separately. *Rex* v. *Locker, Wainwright and wife*, 5 Esp. 107. Ellenborough, C. J. 1804.

139. And *semble*, that upon a joint indictment, one defendant who suffers judgment by default, cannot be called as a witness for another defendant who pleads. *Rex* v. *Lafone, Hepburn, Davis, Billiter, and another*, 5 Esp. 155. Ellenborough, C. J. 1804.

Contra, ante, pl. 129, 130.

140. In an action for goods sold, the plaintiff's son who is held out to the world as a partner, and accepts bills drawn in their joint names, but who denies that he has any share in the business, is a competent witness. *Parsons* v. *Crosby*, 5 Esp. 199. Ellenborough, C. J. 1805; ante, pl. 125.

C. (k) *Privies in estate.*

141. Tenant in possession cannot be called to support his landlord's title. *Doe*, d. *Winckley*, v. *Pye*, *esq. Principal of Barnard's Inn*, 1 Esp. 364. Kenyon, C. J. 1795.

S. P. *Doe* d. *Foster* v. *Williams*, Cowp. 621.

142. But he is a good witness for the plaintiff. *Doe* d. *Turner* v. *Wallinger*, Holroyd, J. Dorchester Spring Assizes, 1819.

143. A lessor cannot be called to prove right of possession in his lessee. *Smith* v. *Chambers*, 4 Esp. 164. Ellenborough, C. J. 1802.

Acc. *Fox* v. *Swann*, Starkie, 482; but see *Bell* v. *Harwood*, 3 T. R. 308, 10; ante. C. (b). pl. 52, 53.

144. In an action for not manuring a farm according to covenant, a sub-lessee

of the defendant is a *competent* witness to shew that the stipulated quantity has been laid on. *Wishaw* v. *Barnes*, 1 Campb. 341. Ellenborough, C. J. 1808.

Sed vide ante, EVIDENCE, pl. 66, 67.

145. The party under whom defendant makes cognizance in replevin, may be called at the trial. His declarations cannot therefore be given in evidence *to disprove the tenancy*. *Hart* v. *Horn*, 2 Campb. 92. Heath, J. Kingston, 1809.

146. So the wife of such party. *Johnson* v. *Mason*, 1 Esp. 89. Kenyon, C. J. 1794.

But see *Dyke* v. *Aldridge*, 7 T. R. 665, and 11 East, 584; ante, pl. 82.

And see *Rex* v. *Woburn*, 10 East, 395, and observation of Le Blanc, J. *ibid.* 402; *Rex* v. *Hardwick*, 11 East, 578.

147. But in another case where the defendant made cognizance under the party beneficially interested, and also under the person who had the legal estate, it was held that the trustee could not be called *to support the title*. *Golding* v. *Nias*, 5 Esp. 272. Chambre, J. 1805.

148. Where, upon a justification in trespass under a prescriptive right to a watercourse, *the course of the stream* is put in issue, a person claiming a similar right cannot be examined for the defendant. *Jebb* v. *Povey*, 2 Esp. 679. Kenyon, C. J. 1798.

149. It would have been otherwise, if the traverse had been taken upon *the right of the defendant's messuage* to the watercourse. *Ibid.*

150. So in an action against the occupier of an adjoining close, for not fencing against a common, the plaintiff's landlord and other commoners are not competent witnesses. *Anscomb* v. *Shore*, 1 Campb. 290. Heath, J. and C. P. 1808.

151. A commoner cannot be called to negative a right of common claimed on the same common. *Brown* v. *Hurley*. Abbott, J. Devon Spring Assizes, 1818.

152. A public highway may be proved by a witness who has agreed to grant at an annual rent, a private way across his land, which cannot be used, unless the road in dispute be established. *Pollard* v. *Scott*, Peake, 18. Kenyon, C. J. 1790.

153. In an action for work in papering rooms, the owner of the house is not a good witness to prove that he agreed to pay the defendant, by whom the plaintiff was employed, a gross sum for the repairs of the house, without a release from the plaintiff. *New* v. *Chidgey*, Peake, 98. Kenyon, C. J. 1791.

C. (1) *Servants.*

154. A book-keeper is a good witness for his master, *of necessity*, without a release. *Spencer* v. *Goulding and another*, Peake, 129. Kenyon, C. J. 1792.

S. P. Bull. N. P. 289.

And see ante, EVIDENCE, pl. 342.

155. A servant employed to receive money, is a good witness, *ex necessitate*, without a release, to prove that he has received it and that he has paid it over to his principal. *Matthews* v. *Haydon*, *gent.* 2 Esp. 509. Kenyon, C. J. 1796.

156. A servant employed to deliver goods, is a competent witness to prove the delivery. *Adams* v. *Davis*, 3 Esp. 48. Eldon, C. J. 1799.

157. It might perhaps be otherwise, if it could be shewn that it was usual for the servant to receive the price from the customer. *Ibid.*

Sed vide ante, EVIDENCE, pl. 342.

158. A broker employed by the landlord to make a distress, is not a competent witness to prove that the distress was not excessive. *Field* v. *Mitchell*, 6 Esp. 71. Ellenborough, C. J. 1807.

159. In an action for negligence in running against the plaintiff's cart with a dray, the plaintiff cannot call his servant who drove the cart without releasing him. *Miller* v. *Falconer*, 1 Campb. 251. Ellenborough, C. J. 1808.

160. A broker employed by an agent is not a good witness for such agent, to negative misconduct or negligence, without a release from the agent. *Gevers and another* v. *Mainwaring*, Holt, 139. Gibbs, C. J. 1815.

161. But where excess is new assigned upon a licence to break through plaintiff's wall, the workmen employed are competent witnesses for the defend-

ant. *Cuthbert* v. *Gostling*, 3 Campb. 515. Ellenborough, C. J. 1814.

162. In an action by the owner of a waggon against the proprietors of a coach for the negligent driving of the coachman, whereby plaintiff's fore-horse was killed, the waggoner is a competent witness for his master without a release. *Morish* v. *Foote*, Abbott, J. Devon Spring Assizes, 1818.

C. (m) *Ship owners and masters.*

(And see post, pl. 211.)

163. *Semble*, that in an action for sinking a barge laden with plaintiff's corn, the owner of the damaged barge is a good witness for the plaintiff upon being released, notwithstanding the injury sustained by himself. *Spitty* v. *Bowens*, Peake, 53. Kenyon, C. J. 1791.

164. In an action upon a policy on goods, the owner cannot prove the vessel seaworthy without a release from the plaintiff. *Rothcroe and others* v. *Elton*, Peake, 84. Kenyon, C. J. 1791.

165. S. P. ruled in *Fox* v. *Lushington*, Peake, 85, n. Kenyon, C. J. 1791.

Acc. *Martyn* v. *Hendrickson*, 1 Salk. 287. S. C. 2 Lord Raym. 1007. S. C. Holt, 756.

166. In an action by shipper of corn against owner of vessel for negligence, the plaintiff may release the captain and examine him as to the occasion of the loss. *Lay* v. *Holock*, Peake, 101. Kenyon, C. J. 1790.

167. S. P. *Spitty* v. *Bowens*, *ubi supra.*

168. In an action on a policy for a loss by *barratry*, the captain is not a competent witness to prove the consent of the owners to the supposed act of barratry, without a release from the underwriter. *Bird* v. *Thompson*, 1 Esp. 339. Kenyon, C. J. 1795.

And see *Evans* v. *Williams*, 7 T. R. 481, n. post, pl. 171.

And for a definition of barratry, see *Nutt* v. *Bourdieu*, 1 T. R. 323.

169. In an action by two part owners for an injury done to a ship, the master is a competent witness if released by one of the plaintiff's only. *Hockless et alt.* v. *Mitchell*, 4 Esp. 86. Kenyon, C. J. 1802.

170. In an action against an underwriter on a policy on goods, the captain is not a competent witness to prove that he has not been guilty of a deviation; for though a verdict obtained by the defendant would not be evidence of the fact of deviation in an action against the witness, it would shew that certain expenses had been incurred in the prosecution of an action which had failed through his misconduct. *Taylor* v. *M'Viccar*, 6 Esp. 27. Mansfield, C. J. 1806.

171. In an action against the owner for moneys advanced for the use of the ship, the captain is a competent witness to prove that the moneys advanced to him have been so applied. *Rocher* v. *Busher*, 1 Stark. 27. Ellenborough, C. J. 1815.

And see *Evans* v. *Williams*, 7 T. R. 481, n. coram Lord Kenyon, at Guildhall, 1788, in which case it was ruled that the captain was a competent witness, not on the ground of necessity, but as standing indifferent between the parties; ante, pl. 162, 168.

172. A. whose name has been registered as a part owner, on the oath of B., afterwards conveys to B., covenanting for the goodness of his title. He cannot call B. to prove that he had no interest in the vessel, although the conveyance was, in fact, made for the purpose of correcting B.'s mistake. *Nickson* v. *Thomas*, 1 Stark. 85. Ellenborough, C. J. 1815.

C. (n) *Trustees.*

(And see ante, Trustees.)

174. Trustees of an incorporated public charity are good witnesses in an action brought against themselves in their corporate capacity. *Weller* v. *The Governors of the Foundling Hospital*, Peake, 153. Kenyon, C. J. 1792.

And see *Rex* v. *St. Mary Magdalen, Bermondsey*, 3 East, 7, 12, 13.

175. A trustee in whom a power is vested to nominate an endowed school, is a good witness in support of his own nominee. *Withnell, clerk*, v. *Gartham, clerk*, 1 Esp. 322. Kenyon, C. J. 1795.

S. C. not S. P. 6 T. R. 388.

176. Where defendant in replevin makes cognizance under the party beneficially interested, and also under the person who has the legal estate, the

latter cannot be called. *Golding* v. *Nias*, 5 Esp. 272. Chambre, J. 1805.

Sed vide ante, pl. 16, 52, 53, 143.

C. (o) *In other cases.*

177. Held, that upon an indictment against A. for perjury committed on a trial, the party who was injured by the verdict, and who had filed a bill for relief, was not a competent witness; as a conviction would be a ground for ordering the refunding of the money obtained by the verdict. *Rex* v. *Dalby*, Peake, 12. Kenyon, C. J. 1790.

And see Watts's case, Hardres, 331.

178. But the party who *succeeded* at the trial may be examined. *Rex* v. *De Faria*, Peake, 104. Kenyon, C. J. 1790.

179. It has since however been held, on the authority of *Rex* v. *Bostock*, 4 East, 572, (S. C. 1 Smith, 202,) that where A. is convicted under a statute upon the evidence of B. the conviction is not evidence to support a justification pleaded by B. to an action of trespass, though B.'s name do not appear on the face of the proceedings. *Smith* v. *Rummens*, 1 Campb. 9. Ellenborough, C. J. 1807.

And see *Rex* v. *Bray*, Cases temp. Hardw. 358; *Rex* v. *Broughton*, 2 Stra. 1229; *Burdon* v. *Browning*, 1 Taunt. 520.

180. The conviction may, however, be read for the purpose of shewing that B. was not actuated by malice. *Smith* v. *Rummens*, *ubi supra.*

181. Party arrested is a good witness in an action against the sheriff for an escape; as he will remain liable for the debt. *Cass and another* v. *Cameron*, Peake, 124. Kenyon, C. J. 1792.

S. P. *Rex* v. *Warden of the Fleet*, 12 Mod. 338; Bull. N. P. 67.

And see *Powell* v. *Hord*, 1 Stra. 650; S. C. 1 Lord Raym. 1411.

182. It is no objection to the competency of a witness on an indictment for perjury, committed in an answer in chancery, that, in his answer to a cross bill, he has sworn to the same fact which he is now called to prove. *Rex* v. *Pepys, esq.* Peake, 138. Kenyon, C. J. 1792.

Sed vide APPENDIX.

183. A defendant who has not paid debt and costs, though his bail are fixed, is not competent to prove perjury committed at the trial. *The King* v. *Eden*, 1 Esp. 97. Kenyon, C. J. 1794.

184. In a qui tam action for usury, the borrower is a competent witness to prove the whole case, whether the loan be repaid or not. *Smith, qui tam*, v. *Prager*, 2 Esp. 486. Kenyon, C. J. 1796.

And the court of K. B. discharged a rule for a new trial. *Ibid.* and 7 T. R. 60.

185. A person who has undertaken to indemnify the plaintiff's attorney, cannot be examined for the plaintiff without a release from the attorney. *York* v. *Gribble*, 1 Esp. 319. Kenyon, C. J. 1795.

186. But he requires no release from the defendant. *Ibid.*

187. The plaintiff in a foreign attachment cannot be called to support the proceedings in that suit, in a subsequent action brought by the defendant in the attachment against the garnishee. *Lord Barrymore, administrator*, v. *Taylor*, 1 Esp. 327. Kenyon, C. J. 1795.

188. A witness will not be rejected on the ground that, on his cross-examination, a question may be put, the answer to which may affect him criminally. *Barber* v. *Gingell*, 3 Esp. 60. Kenyon, C. J. 1799.

189. In an action against a candidate for bribery, the voter, though *particeps criminis*, is a good witness to prove the offence. *Dover* v. *Macstaer*, 5 Esp. 92. Ellenborough, C. J. 1803.

S. P. *Bush* v. *Ralling*, Sayer, 289.

1[illegible]. In an action on the warranty of a h[illegible], a prior vendor who warranted to the defendant, is competent to prove the soundness. *Briggs* v. *Crick*, 5 Esp. 99. Alvanley, C. J. 1804.

And see *Barker* v. *Barker*, 1 Wightw. 397, 9; *Nix* v. *Cutting*, 4 Taunt. 18.

191. A mere obligation in honour does not render a witness incompetent. *Pederson* v. *Stoffles*, 1 Campb. 145. Mansfield, C. J. 1807.

But see *Fothergington* v. *Greenwood*, 1 Stra. 129; Anonymous, cited in Rudd's case, 1 Leach, Cro. Ca. 154; and see *Rex* v. *Woburn*, 10 East, 395.

192. In an action for fraudulently

misrepresenting the solvency of J. H., J. H. is a competent witness for the plaintiff, as he cannot avail himself of a recovery in this action, when sued for the price of the goods. *Richardson and another* v. *Smith*, 1 Campb. 277. Ellenborough, C. J. 1808.

Sed vide *Bird* v. *Randall*, 3 Burr. 1345. S. C. 1 Bla. 373.

193. In an action for goods sold to the defendant and by his order delivered to a third person for her own use, the latter is not a competent witness to prove the contract without a release from the plaintiff. *Wright* v. *Wardle, esq. M. P.* 2 Campb. 201. Ellenborough, C. J. 1809.

194. And *semble*, that if she be a married woman, though living in adultery apart from her husband, a release must be executed to him also. *Ibid.*

195. A person who has bought goods in his own name is not a competent witness to prove that he purchased them as agent for the defendant. *M'Brain* v. *Fortune and another*, 3 Campb. 317. Ellenborough, C. J. 1812.

N. It does not appear that any release was offered; see the last case.

196. A carrier who is employed by A. to convey a sum of money to B. and pays it by mistake to C. is a good witness *from necessity*, to prove the payment to C. in an action brought against him by A. for the amount without a release. *Barker* v. *Macrae*, 3 Campb. 144. Ellenborough, C. J. 1811.

197. If the sheriff's officer who makes an arrest, attest the execution of the bail bond at the request of the person arrested, the latter is precluded from objecting to the examination of the officer, in an action on the bail bond, though he is substantially a party to the suit. *Honeywood, bart. sheriff of Kent*, v. *Peacock*, 3 Campb. 196. Ellenborough, C. J. 1812.

198. A clerk to commissioners of taxes, is bound, when subpœnaed, to produce his books, and answer all questions relevant to the issue, notwithstanding his oath of office. *Lee, qui tam*, v. *Birrell*, 3 Campb. 337. Ellenborough, C. J. 1813.

C. (p) *Objection, when taken.*

199. An objection to the competency of a witness may be raised in any stage of the trial. *Stone* v. *Blackburne*, 1 Esp. 37. Kenyon, C. J. 1793.

Sed vide *Regina* v. *Muscot*, 10 Mod. 193.

200. Where the incompetency of the witness appears on the face of his answer to interrogatories, the objection is waived by putting cross interrogatories, and cannot be insisted on at the trial. *Ogle* v. *Paleski*, Holt, 485. Gibbs, C. J. 1816.

201. A witness who, from the statement of his partner, made under no circumstance of suspicion, believes that he is a creditor of a bankrupt, cannot be called by the assignees. *Atkins and others* v. *Seward and others.* Holroyd, J. Winchester Spring Assizes, 1819.

C. (q) *Objection, how repelled.*

202. Where an objection to the competency of a witness arises out of his examination on the *voir dire*, he may be asked any question to shew that his interest has ceased, though the proceedings by which it was determined, could, under other circumstances, have been proved only by written evidence. *Butchers' Company* v. *Jones*, 1 Esp. 160. Kenyon, C. J. 1794.

And see *Regina* v. *Muscot*, 10 Mod. 193. *Turner* v. *Pearte*, 1 T. R. 717.

203. Thus where in an action by a corporation, the witness admits that he was once a member, he may state that he is now disfranchised, without producing the corporation books. *Butchers' Company* v. *Jones, ubi supra.*

204. So where in an action by assignees, the witness acknowledges that he was a creditor of the bankrupt, it is sufficient for him to allege, that he has since become a bankrupt himself, and obtained his certificate, without producing such certificate. *Botham* v. *Swingler*, 1 Esp. 164; differently reported, Peake, 218. Kenyon, C. J. 1794.

205. But this privilege extends only to a regular examination on the *voir dire* before any examination in chief. Therefore a witness cannot, upon his *cross examination*, be interrogated as to the contents of written instruments, for the purpose of raising an objection to his

competency. *Howell* v. *Lock*, 2 Campb. 14. Ellenborough, C. J. 1809.

C. (r) *Competency, how restored.*

206. In an action against the owner of a vessel for a loss occasioned by the negligence of the pilot, the latter is a good witness for the defendant, upon being released by him, without a release from the captain. *Aldrich* v. *Simmons*, 1 Stark. 214; 4 Campb. 392. Gibbs, C. J. 1816.

And see ante, SHIP, G.

207. A general release discharges the party from all liability in respect of past transactions, although no cause of action have accrued. *Scott and others* v. *Lifford*, 1 Campb. 249. Ellenborough, C. J. 1808.

S. C. not S. P. 9 East, 347.

208. In an action by tenants in common, a release, executed by only one of the plaintiffs, is sufficient. *Hockless et alt.* v. *Mitchell*, 4 Esp. 86. Kenyon, C. J. 1802.

209. To restore the competency of an interested witness, it is necessary either to produce a release or to shew that it has been lost. *Corking* v. *Jarrard*, 1 Campb. 37. Ellenborough, C. J. 1807.

210. A guardian *ad litem*, possesses, as such, no authority to release a witness. *Fraser* v. *Marsh*, 2 Stark. 41. Ellenborough, C. J. 1817.

And see ante, EVIDENCE, pl. 290.

211. *Semble*, that in an action for running down a ship, the captain may be rendered a competent witness by a release to himself and the rest of the crew, with a single stamp. *Perry* v. *Bouchier*, 4 Campb. 80. Ellenborough, C. J. 1818.

N. Especially when the captain's name stands first, and the release is first tendered to him. *Ibid.*

212. In an action by an executor, the residuary legatee is not rendered a competent witness for the plaintiff by releasing all claim to the debt, since the costs would be a charge on the estate. *Baker, widow, executrix, &c.* v. *Tyrwhitt*, 4 Campb. 27. Ellenborough, C. J. 1814.

213. The witness must release the residue altogether, or the attorney must release his costs, the estate not being chargeable with the defendant's costs. *Ibid.*

D. PERSONAL DEFECT.

(And see post, E. (c). As to alien enemies, see Falcon, Atkins, 6 Rob. A. R. 197.)

D. (a) *Crime.*

214. The record of a conviction without a caption, cannot be read to incapacitate a witness. *Cooke* v. *Maxwell*, 2 Stark. 183. Bayley, J. 1817.

E. EXAMINATION OF WITNESSES.

E. (a) *Oath, how administered.*

(2 Anst. 279.)

215. A jew, who has never formally renounced the religion of his ancestors, but considers himself a member of the established church, may be sworn on the gospels. *Rex* v. *Gilham*, 1 Esp. 285. Kenyon, C. J. 1795.

216. A member of a religious community which objects to the ceremony of kissing the book, may be examined without it. *Mee* v. *Reid*, Peake, 23. Kenyon, C. J. 1790.

S. P. *Dutton* v. *Colt*, 2 Siderf. 6. Mildrone's case, Leach, C. C. 459.

Acc. *Omychund* v. *Barker*, 1 Atk. 21, 42.

E. (b) *Declarations in articulo mortis.*

217. It is exclusively a question for the court whether a declaration made *in articulo mortis*, be under the circumstances admissible evidence. Per 12 judges, on a question referred to them by the judges in Ireland. *Rex* v. *Hucks*, 1 Stark. 523.

E. (c) *Questions affecting the witness personally.*

(And see ante, C. (b) 78, 79, 80; ACTION ON THE CASE, A. (c) pl. 24, 25.)

218. A witness should not be asked whether he believes in Jesus Christ or in the Gospels, but whether he believes in God, in the obligation of an oath, and in a future state. *The King* v. *Taylor*, Peake, 11. Buller, J. 1790.

219. *Semble*, that a witness is bound to answer questions which may subject him to a *civil* responsibility. *Doxon* v. *Haigh et alt.* 1 Esp. 409. Kenyon, C. J. 1795.

S. P. declared to be law by 46. Geo. III. cap. 37. s. 1.

And see 13 & 14 Car. II. cap. 18. sect. 11; *Regina* v. *Newell*, Parker, 270.

220. A letter written by a witness, contradictory to his present testimony, may be read for the purpose of impeaching his credit. *De Sailly* v. *Morgan*, 2 Esp. 691. Kenyon, C. J. 1798.

And see ante, INSURANCE, pl. 231.

221. It is no ground for rejecting a witness, that upon his cross-examination a question *may* be put which may affect him criminally. *Barber* v. *Gingell*, 3 Esp. 60. Kenyon, C. J. 1799.

But see *Cates* v. *Hardacre*, 3 Taunt. 424.

222. A witness who answers questions tending to criminate himself on his examination in chief, is bound to answer on the cross examination, though his answer may implicate him in a transaction affecting his life. Per Dampier, J. Winchester Summer Assizes, 1815.

223. Held, that a witness cannot be interrogated as to his having been in a house of correction. *Rex* v. *Lewis and others*, 4 Esp. 225. Ellenborough, C. J. 1802.

224. If, however, upon such a question being put, he admits the fact, the prosecution may call evidence of his subsequent good conduct. *Rex* v. *Clarke*, 2 Stark. 241. Holroyd, J. 1817.

225. And *semble*, that a witness should not be asked questions which tend *directly* to disgrace him. *Macbride* v. *Macbride*, 4 Esp. 242. Alvanley, C. J. 1802.

226. In an action for seduction, the servant cannot be asked if she previously had intercourse with other men. *Dodd* v. *Norris*, 3 Campb. 519. Ellenborough, C. J. 1814.

227. Answers given to questions to which the witness or examinant might have demurred, may be employed against him. *Smith and others, assignees of Parquet*, v. *Beadnell*, 1 Campb. 30. Ellenborough, C. J. 1807.

228. So any acknowledgment extracted by the commissioners, however irrelevant to the bankruptcy, may be used against the examinant. *Stockfleth* v. *De Tastet and others*, 4 Campb. 10. Ellenborough, C. J. 1814.

229. But *semble*, that the chancellor would order such examination to be taken off the file. *Ibid.*

230. It being a misdemeanour to copy an *extrajudicial* affidavit which contains libellous matter, even for the purpose of presenting it to the magistrate to be sworn, a person who has made such a copy cannot be compelled to disclose the contents of such affidavit. *Muloney* v. *Bartley*, 3 Campb. 210. Wood, B. Gloucester, 1812.

E. (d) *Repudiation of evidence.*

231. If a witness upon his examination in chief give evidence against the plaintiff, by whom he is called, his testimony may be entirely repudiated by calling witnesses to contradict him. *Alexander* v. *Gibson*, 2 Campb. 556. Ellenborough, C. J. 1811.

But see *Adams* v. *Arnold*, 12 Mod. 375; 1 Nolan, 442.

232. But a party is not at liberty to set up so much of his witnesses' testimony as makes for him, rejecting and disproving such part as makes against him. *Ibid.*

Secus, as to witness produced by the adverse party. *Bermon* v. *Woodbridge*, Dougl. 788.

And see LIMITATION OF ACTIONS, A. (c) pl. 33.

E. (e) *Cross examination.*

(And see ante, pl. 221, 2.)

233. Witnesses cannot be cross examined to rebut an *assertion* made by counsel, which they have not attempted to *prove*. *Lucas* v. *Novosilieski*, 1 Esp. 296, 8. Eyre, C. J. 1795.

234. A witness may be cross examined, though the party calling him may not have chosen to examine him in chief. *Phillips* v. *Eamer et alt. sheriffs of London*, 1 Esp. 357. Kenyon, C. J. 1795.

And see *Valliant* v. *Dodemead*, 2 Atk. 524.

235. A witness cannot be cross exa-

mined as to the contents of an affidavit which he formerly made, unless such affidavit, or an office copy, be in court. *Sainthill* v. *Bound*, 4 Esp. 74. Kenyon, C. J. 1801.

236. Counsel cannot assume that the witness has made a statement on his examination in chief which was not in fact made. *Hill* v. *Coombe*. Abbott, J. Exeter Spring Assizes, 1818.

237. Or put a question which assumes a fact not in proof. *Doe* d. *Handley* v. *Wood*. Abbott, J. Launceston Spring Assizes, 1818.

238. A witness may be cross examined as to a fact irrelevant to the issue, for the purpose of discrediting his testimony. *Harris* v. *Tippett*, 2 Campb. 637. Lawrence, J. Gloucester, 1811.

239. But other witnesses cannot be called to contradict him, *Ibid.*

And see *Spenceley, gent.* v. *De Willott*, 7 East, 108, where the same point seems to have been fully settled.

240. Where, however, the answer to the irrelevant question is accompanied by a denial of a threat against the prisoner, witnesses may be called to prove such threat. *Rex* v. *Yewin*, 2 Campb. 638. Lawrence, J. Monmouth, 1811.

And see rules for cross examination, in Quinct. lib. 5, cap. 7.

E. (f) *Leading questions.*

(3 Anst. 923.)

241. A *leading* question may be put by the defendant to a witness called by the plaintiff, after such witness has been cross examined and quitted. *Dickinson* v. *Shee*, 4 Esp. 68. Kenyon, C. J. 1801.

242. A leading question may be put to a witness, called for the purpose of contradicting an *affirmative* statement of another witness, respecting the contents of a lost letter. *Courteen* v. *Touse*, 1 Campb. 43. Ellenborough, C. J. 1807.

243. To prove that A. and B. are partners, a witness may be asked whether A. has interfered with the business of B. *Nicholls* v. *Dowding and Kemp*, 1 Stark. 81. Ellenborough, C. J. 1815.

E. (g) *Assistance of papers.*

244. An agent who executes a deed under a power of attorney cannot be examined with respect to the contents of such deed, unless the power of attorney be produced. *Johnson* v. *Mason*, 1 Esp. 89. Kenyon, C. J. 1794.

245. Deposition formerly made by an old witness, allowed to be read to him for the purpose of refreshing his memory as to dates. *Vaughan* v. *Martin*, 1 Esp. 440. Kenyon, C. J. 1795.

And see *Doe* v. *Perkins*, 3 T. R. 749.

246. The examination on oath of a deceased witness at a former trial, is admissible evidence. *Strutt* v. *Bovingdon and others*, 5 Esp. 56. Ellenborough, C. J. 1803.

247. Where a rule is made for examining witness upon interrogatories, on the ground of his being about to leave the kingdom, his depositions may be read if he have actually sailed on the voyage, though the vessel has been driven back into port by contrary winds. *Fonsick* v. *Agar and others*, 6 Esp. 92. Mansfield, C. J. 1806.

Acc. *Ward* v. *Wells*, 1 Taunt. 461.

And see Quinct. lib. 5, cap. 7.

248. A person who has from time to time examined entries in a log book while the events were fresh in his recollection, may refer to the book to refresh his memory when examined as to a fact recorded therein, and which he remembers to have seen there at a time when he had a clear recollection of the circumstances. *Burrough* v. *Martin*, 2 Campb. 112. Ellenborough, C. J. 1809.

And see *Tanner* v. *Taylor*, 3 T. R. 754; *Doe* d. *Church*, v. *Perkins*, *ibid.* 750; *Jacobs* v. *Lindsay*, 1 East, 460.

E. (h) *Questions from jury.*

249. The jury, after retiring from the bar, cannot send for one of the witnesses to examine him in their absence from the court. *Rex* v. *Scott*. Holroyd, J. Winchester Spring Assizes, 1819.

F. Production of papers upon subpœna duces tecum and notice.

(3 Anst. 648.)

250. In trover against the messenger under a commission of bankrupt, it was held that the defendant was not bound to produce the proceedings under the commission, though in court, and notice given to produce them. *Law* v. *Wells*, Peake, 93. Kenyon, C. J. 1791.

251. And it was held that the solicitor, under a commision of bankruptcy, is not only not bound to produce the proceedings under a *subpœna duces tecum*, but that he would not be justified in so doing, as the papers belong, not to himself, but to the assignees. *Bateson* v. *Hartsink et alt.* 4 Esp. 43. Kenyon, C. J. 1801.

252. But it has been since ruled to be a public duty to produce the proceedings. *Pearson* v. *Fletcher*, 5 Esp. 90. Ellenborough, C. J. 1803.

253. In cases of this nature, the discretion of the judge at nisi prius will guard the interests of third parties. *Corsen* v. *Dubois*, Holt, 239. Gibbs, C. J. 1816.

And see post, pl. 258.

254. It has also been decided, that an action will lie against a party who refuses to produce a paper in his actual possession, though the legal custody may belong to another. *Amey* v. *Long*, 1 Campb. 14, 180, a. and 6 Esp. 116. Ellenborough, C. J. 1807.

And the court of K. B. upon argument and full consideration, discharged a rule for arresting the judgment. 9 East, 473.

And see *Field* v. *Beaumont*, 1 Swanst. 209.

255. So, although the papers may be got at by other means. *Corsen* v. *Dubois*, Holt, 239. Gibbs, C. J. 1817.

256. A witness is not compellable by *subpœna duces tecum* to produce *all* papers which do not tend to criminate himself, but may withhold a document *under which he derives title. Miles et alt.* v. *Dawson*, 1 Esp. 405. Kenyon, C. J. 1795.

See this case explained, 9 East, 477, n. a.

257. But it has since been held, that a solicitor may be compelled to produce his client's lease where such production will not operate to his prejudice. *Copeland* v. *Watts and another, executors of Gubbins*, 1 Stark. 95. Gibbs, C. J. 1815.

258. But the court will satisfy itself that no such consequence is likely to ensue before it will permit the instrument to be used. *Ibid.*

And see ante, pl. 253.

259. If a witness after being called upon by a *subpœna duces tecum* to produce a letter, deliver it to the opposite party by whom it is withheld, evidence of the contents may be given, without notice to produce the letter. *Leeds* v. *Cook, et ux.* 4 Esp. 256. Ellenborough, C. J. 1803.

G. Subscribing witness.

260. Proof by the person whose name appears as attesting the execution of a deed by several parties, that she was not present when it was executed, but that she was afterwards requested by one of the parties to sign the attestation, is sufficient evidence of the execution of the instrument by such party. *Grellier* v. *Neale and others*, Peake, 146. Kenyon, C. J. 1792.

And see *Parke* v. *Mears*, 2 Bos. & Pul. 217; Quinct. lib. 5, cap. 5.

261. In such case witnesses may be called to prove the hand-writing of the remaining parties. *Ibid.*

262. And upon evidence of the signature, sealing and delivery may be presumed. *Ibid.*

S. P. per Grant, M. R. in *Burrowes* v. *Lock*, 10 Ves. 474.

263. The signature of A. appears as attesting the execution of a deed by B. A. denies having seen it executed. Held, that if no imputation be cast upon the veracity of A., the instrument cannot be proved by evidence of the handwriting of B., or by his acknowledgment that it is his deed. *Phipps* v. *Parker*, 1 Campb. 412. Ellenborough, C. J. 1808. S. P. contra. *Fitzgerald* v. *Elsee*, 2 Campb. 635. Lawrence, J. 1811.

264. Where the name of B. appears as subscribing witness to a promissory note, and B. swears that he did not see it drawn, witnesses may be called to prove the handwriting of the maker. *Lemon* v. *Dean*, 2 Campb. 636. n. Le Blanc, J. Lancaster, 1810.

N. And per Le Blanc, J.—" I will make no observation upon that case, (*Phipps* v. *Parker.*) It may be distinguishable, as there the instrument was a deed. But I am quite clear that if the subscribing witness to a note, when called, cannot prove it by reason of his not having seen it drawn, the plaintiff may proceed to prove it by other means." *Ibid.*

265. The obligor informs A. that he has executed the bond, and desires him to attest it. A. is a good subscribing witness. *Powell and another* v. *Blackett*, 1 Esp. 97. Kenyon, C. J. 1794.

266. *Secus*, if there be another attesting witness who actually saw the instrument executed. *M'Craw* v. *Gentry*, 3 Campb. 232. Ellenborough, C. J. 1812.

And see *Wright* v. *Wakeford*, 4 Taunt. 220.

267. A bond, after being executed, is brought into an adjoining room, where A. is requested by the attorney to attest it, which he does accordingly in the presence of the obligor. A. is a good witness to prove the execution. *Park* v. *Mears*, 3 Esp. 171. Eldon, C. J. 1800.

And the court of C. P. refused a rule nisi to enter a nonsuit. *Ibid.* and 2 Bos. & Pul. 217.

268. Where the parties whose names appear as subscribing witnesses, disavow having seen the instrument executed, other persons who were present at the execution, or know the handwriting of the party, may be called. *Ley* v. *Ballard et alt.* 3 Esp. 173, n. Kenyon, C. J. 1790.

269. If the name of a fictitious person be put as subscribing witness, evidence of the handwriting of the party will be sufficient. *Fasset and another* v. *Brown*, Peake, 23. Kenyon, C. J. 1790.

270. An instrument (e. g. a warrant of distress) to which there is an attesting witness, can only be proved by him. *Higgs* v. *Dixon*, 2 Stark. 180. Ellenborough, C. J. 1817.

271. A deed executed in the presence of a subscribing witness, cannot be proved by any other person, though it have been cancelled, and be produced only as evidence of the admission of a particular fact stated in the recital. *Breton* v. *Cope, executor*, Peake, 31. Kenyon, C. J. 1791.

272. Where the subscribing witness is out of the reach of process, evidence of his handwriting may be given as if he were dead. *Holmes* v. *Pontin*, Peake, 99. Kenyon, C. J. 1790.

273. S. P. admit. *Cooper* v. *Marsden*, 1 Esp. 2. Kenyon, C. J. 1793.

274. But this rule extends no further than the case of a mere instrumentary witness. *Ibid.*

And see *Jones* v. *Brewer*, 4 Taunt. 46.

275. Where, at the expiration of a term, the lessee gives notice to an under-tenant in possession to pay rent to the lessor, which notice the latter attests, with a knowledge of its contents, the first lessee is discharged. *Harding* v. *Crethorn*, 1 Esp. 57. Kenyon, C. J. 1793.

276. *Secus*, if he subscribe his name without knowing the contents of the instrument. *Ibid.*

And see *Welsford* v. *Beazley*, 1 Vez. 7.

277. A person is not allowed to acknowledge his own deed in court; the execution must be proved by the subscribing witness. *Johnson* v. *Mason*, 1 Esp. 89. Kenyon, C. J. 1794.

And see post, pl. 283. *Absalon* v. *Anderton*, 3 Leon, 84.

An indorsement on a promissory note purporting to have been attested by A. can only be proved by A. *Stone* v. *Metcalf*, 1 Stark. 53. Ellenborough, C. J. 1815.

And see post, Appendix, 349, Bills and Notes, I (a).

278. In an action for not completing a purchase, the vendor need not prove the execution of the deeds which form his title. *Thomson* v. *Miles*, 1 Esp. 184. Kenyon, C. J. 1794.

279. A deed must be proved by the subscribing witness where it is produced by a person who is not the attorney on

the record, though he were attorney for the party at the time of the execution. *Leith* v. *Post*, 1 Esp. 196. Kenyon, C. J. Maidstone, 1794.

And see ante, B. (d) pl. 29.

280. To prove the execution of a will of lands, it is sufficient to call *one* of the subscribing witnesses. *Doe* d. *Stutsbury*, *ux. et alt.* v. *Smith*, *et ux.* 1 Esp. 391. Kenyon, C. J. 1795.

S. P. *Dayrell* v. *Glascock*, Skinn. 413; *Holdfast* v. *Dawsing*, 2 Stra. 1253; S. C. 1 Bla. 8; Bull. N. P. 264; Gilb. Ev. 69.

281. Where subscribing witness becomes interested, evidence of the hand-writing of the party may be given. *Buckley* v. *Smith*, 2 Esp. 697. Kenyon, C. J. 1798.

282. And it is immaterial whether the instrument is given in evidence collaterally, or is the foundation of the action. *Manners*, *qui tam*, v. *Postan*, 4 Esp. 240. Alvanley, C. J. 1803.

And see ante, pl. 274.

283. An admission of the due execution of a bond contained in the defendant's answer in chancery, does not dispense with the necessity of calling the subscribing witness. It is only secondary evidence. *Sir John Call, bart.* v. *Dunning*, 5 Esp. 16. Ellenborough, C. J. 1803.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.* and 4 East, 53.

And see ante, pl. 277; *Laing* v. *Raine*, 2 Bos. & Pull. 85; *Jones* v. *Brewer*, 4 Taunt. 46.

N. But in an action against an apprentice, where the indenture has been inrolled according to the custom of London, the execution need not be proved. Anon. Skinn. 579.

284. An admission signed by the obligor's attorney, acknowledging the *signature* of his client and of the *attesting witness*, is presumptive evidence of the delivery of the deed. *Milward* v. *Temple*, 1 Campb. 375. Ellenborough, C. J. 1808.

Acc. *Burrows* v. *Lock*, 10 Ves. 470, 4.

285. Where search was made *two days* before the trial for an attesting witness at his own house, at his father's, and in the neighbourhood, and the answer to the inquiry was, that he was run away, evidence of his handwriting was admitted. *Crosby* v. *Percy*, 1 Campb. 303. Mansfield, C. J. 1808.

And the court of C. P. discharged a rule for a new trial. 1 Taunt. 364.

And see *Adam* v. *Kerr*, 1 Bos. & Pul. 360; *Parker* v. *Hoskins*, 2 Taunt. 223; *Gough* v. *Cecil*, Serjeant Hill's MSS. 21. p. 78; Selw. N. P. 491.

286. The subscribing witness appears to have been an attorney, who at that time had an office in the city, but resided at Sydenham. To excuse the non-production of this witness it is not sufficient to shew that he had not been heard of by his clerk, and other persons who have inquired for him in the city, no inquiry appearing to have been made at Sydenham. *Wardell* v. *Fermor*, 2 Campb. 282. Ellenborough, C. J. 1809.

287. But where it is proved that a twelvemonth since a commission of bankrupt issued against the subscribing witness, to which he has not appeared, it will be presumed he is out of the kingdom, and evidence of his handwriting will be admitted. *Ibid.*

288. The hand-writing of an attesting witness residing in Ireland may be proved, although no steps have been taken to procure his attendance. *Hodnett* v. *Forman*, 1 Stark. 90. Ellenborough, C. J. 1815.

Acc. *Prince* v. *Blackburn*, 2 East, 250.

289. The payment of money into court upon a breach of covenant, is such an admission of the deed as dispenses with the necessity of calling the subscribing witness. *Randall* v. *Lynch*, 2 Campb. 357. Ellenborough, C. J. 1810.

290. Upon an issue whether the date of a deed has been altered, the subscribing witness must be called. *Edinburgh* v. *Crudell*, 2 Stark. 284. Ellenborough, C. J. 1817.

WRIT OF RIGHT.

A. Tender of the demy mark.

(a) *At what time to be made.*

B. Evidence.

A. Tender of demy mark.

A. (a) *At what time to be made.*

1. The tenant first begins his case because the (inquiry as to the) seisin is first prayed for and joined by him. However, if the tenant tenders the demy-mark, *at the time of the trial* the demandant must then begin. *Throgmorton, Bart.* v. *Broker.* Heath, J. Gloucester Summer Assizes, 1810. Serjeant Hill's MSS. Booth, 98. (u).

From the entries, the proper time of making the tender, seems to be at the time of pleading, inasmuch as the entry of the tender preceding that of the similiter, Booth, 102. And see 2 Wms. Saund. 45 n.; 2 Wils. 261; Lee Dict. Pra. 1062; 3 Chitty's Plead. 653.

2. Tender of the demy mark before the swearing of the Grand Assize is sufficient to put the demandant upon shewing the seisin of his ancestor. *Hardman* v. *Clegg*, Holt, 657. Wood, B. Lancaster, 1817.

If the seisin of the demandant or his ancestor be not in the time of the king, in whose reign he has alleged in his count, the tenant may tender a demy-mark to the king to have the seisin inquired by the grand assize; and then, if the grand assize find not the seisin, as it is alleged, they ought not to inquire any further of the right. Litt. sect. 415; Co. Lit. 294, b; 10 E. 3. 20; 10 E. 4. 9; see the case quoted by Littleton, abridged in Fitz. Droit. 26. 3 E. 3. Iter Northamp.

Booth says, "There is a great question in the law, what is the most proper time for the tender of the demy-mark whether at or before the joining of the (mise) as it is in Lit. sect. 514. at the joining of the (mise) or at the time of swearing of the jury, as Br. Droit. 41. But the law is now taken, that it ought to be at the swearing of the jury, Moor. Rep. 726. Quære, whether at this day there needs any tender of the demy-mark at all, because at common law the seisin could not be traversed, but now issue may be tendered upon the seisin by the statute of 32 H. 8. c. 2. Bro. Droit. 32. By which statute the seisin ought to be within sixty years. If the seising be within sixty years, and it be alleged in the count infra sexagint annos jam ultim' elaps' tempore domini regis C——, if it were not within that king's reign, if the tenant would have any advantage of it, I conceive he ought to make a tender of the demy-mark at this day. But qu. whether he may not say in his count, that he was seised within sixty years, and not mention any king's reign. And I conceive he may, because now the king's reign is not material, in regard the time of limitation is altered, which before was from the time of H. 2. and, therefore, it must appear to the court that the seisin was after his time, and so of necessity to allege in what king's reign the seisin was. Co. Litt. 114 b.; 115 a; 293 a; 2 Inst. 94."

B. Evidence.

3. A counterplea of partes finis nihil habuerunt is disproved by evidence that the conusor was in the perception of the rents of lands, whereof the place demanded is parcel. *Ibid.*

As to the duty of the sheriff in executing and returning the venue where the mise is joined on the mere right. See *Windle* v. *Ricardo*, 1 Taunton and Brodcrip, 17.

APPENDIX.

ABATEMENT.

B. By plea.

B. (a) *Nonjoinder.*

The alleged joint contractor may be called by the plaintiff to disprove such allegation. *Cossham* v. *Goldney and another*, 2 Stark. 414. Bayley, J. 1818.

No authority being produced to shew that the non-joinder of a party as plaintiff, where plaintiffs sue in a representative capacity, is pleadable in abatement, the omission of the name of a joint assignee of a bankrupt was admitted as a ground of nonsuit. *Snelgrove* v. *Hunt*, 2 Stark. 426. Abbott, C. J. 1818.

ACTION.

A. In what cases maintainable.

The liability of the colonel of a regiment for knapsacks furnished to the regiment by his order, depends upon the question, whether they were supplied upon his personal credit. Where the tradesman who furnishes necessaries to a regiment, looks to the regimental fund as the medium through which he is to obtain payment, though by the assistance of the colonel, the latter is not personally responsible. *Prosser* v. *Allen*, 1 Gow, 117. Dallas, C. J. 1819.

And the court set aside a verdict found for the plaintiff, against the judge's direction. *Ibid.*

C. Proper parties.

C. (b) *Defendant.*

Goods are ordered for a club by A. one of the members. Every member who either concurs in the order, or subsequently assents to it, is liable, though A. is made the debtor in the plaintiff's books, and the bill is sent to him, unless it appear that the plaintiff meant to give credit to A. only. *Delauney* v. *Strickland*, 2 Stark. 416. Abbott, C. J. 1818.

E. Form of action.

E. (a) *Account, or Assumpsit.*

A bill is indorsed to A. on account of a partnership transaction. A. indorses to his partner B., who indorses over; B. promises A. that if A. will take up the bill, when dishonoured, he will repay him one half of the amount. A. cannot sue B. in assumpsit. *Robson* v. *Curtis*, 1 Stark. 78. Ellenborough, C. J. 1815.

E. (f) *Trespass, or Case.*

In an action by A. for false imprisonment against B., who had issued a ca. sa. on a judgment fraudulently entered up after the debt has been satisfied, it is stated to have been held that inasmuch as the defendant had pleaded the general issue only, the action was properly framed in *trespass*. *Rogers* v. *Popkin*, 2 Stark. 404. Abbott, J. 1818.

N. Though it was urged that the action should have been *case* and not *trespass*, the ground of the objection is stated to be the subsistence of the judgment; to which the form of the pleadings afforded a sufficient answer; and probably it appeared at the trial that B. had been personally active in executing the writ.

ACTION ON THE CASE.

A. Torts to persons.

A. (e) *Keeping mischievous animals.*

Under a declaration for keeping a dog, which defendant knew was accustomed to bite mankind, the having bitten before and defendant's knowledge must both be proved. *Judge* v. *Cox*, 1 Stark. 285. Abbott, J. 1816.

But *semble*, that it would have been sufficient to state that the defendant kept a dog of savage disposition. *Ibid.*

A. (g) *Malicious arrest.*

A. takes a bank note, which he pays to B., the note is afterwards stopped at the Bank as forged, and is brought by an inspector to A., who immediately pays to B. the amount of the note, and refuses to give it up to the inspector. The inspector, in the absence of all circumstances of suspicion, is not justified in charging A. with feloniously having the note in his possession knowing it to be forged, for the purpose of compelling him to give up the note. By possession under the stat. 45 Geo. III. c. 89, is meant the original possession of a note acquired in an illegal mode, and not a subsequent possession, like the above, where the original possession was legal. *Brooks* v. *Warwick*, 2 Stark. 389. Ellenborough, C. J. 1818.

A. (h) *Malicious prosecution.*

To support an action for a conspiracy in issuing a commission of lunacy, malice and a want of probable cause must be proved. On proof of a total want of probable cause malice may be implied; but, although express malice be proved, some slight evidence of a want of probable cause must be given. *Turner, bart.* v. *Turner and others*, 1 Gow, 20. Dallas, C. J. 1818.

B. Torts to personal property.

B. (g) *Poisoning animals.*

In an action for throwing poisoned barley upon the plaintiff's premises in order to poison his poultry, the jury are not confined in their verdict to the actual damages sustained, but may consider the malicious intention of the defendant. *Shears* v. *Lyons*, 2 Stark. 317. Abbott, J. 1818.

AGENT.

A. Rights of principal against agent.

By the defendant having promised to pay over to the plaintiff the amount of a bill delivered to him to get discounted, pays it away in discharge of a debt of his own. He is liable to the plaintiff *as having discounted* the bill. *Oughton* v. *West*, 2 Stark. 321. Ellenborough, C. J. 1818.

C. Liability of principal to third persons.

C. (a) *On contract of agent.*

Evidence that the son of the defendant, a minor, has, in three or four instances, signed bills of exchange for his father, is sufficient in an action against the father on a guarantee, to warrant the reading of an instrument, purporting to be a guarantee by the father in the handwriting of the son. *Watkins* v. *Vince*, 2 Stark. 368. Ellenborough, C. J. 1818.

C. (b) *For tort of agent.*

In an action for the negligence of defendant's agent in pulling down a party-wall, it is a good defence that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were equally implicated. *Hill* v. *Warren*, 2 Stark. 377. Ellenborough, C. J. 1818.

AGREEMENT.

A. How construed.

A. (b) *Agreement in respect of third persons.*

A guarantee in respect of goods "which A. shall, from time to time, wish to buy," covers goods previously ordered, but the delivery of which was suspended, until the guarantee should be obtained. *Simmons and others* v. *Keating*, 2 Stark. 426. Abbott, C. J. 1818.

A stipulation in the guarantee that credit shall be given for six months, is satisfied by a sale to pay in three months by a bill at three months. *Ibid.*

ARBITRAMENT.

B. Award.

In an action on an award to recover the sum awarded, the defendant cannot dispute the validity of the award, his proper course being to apply to the court to have it set aside. *Swinford* v. *Burn*, 1 Gow, 5. Dallas, C. J. 1818.

An allegation that the time for making the award was in due manner enlarged, to wit, until a certain day, does not render it necessary to prove that the time was enlarged until that day. *Ibid.*

C. Arbitrator.

Semble, that an arbitrator may recover a compensation for his trouble. *Swinford* v. *Burn*, 1 Gow, 7. Dallas, C. J. 1818.

ASSUMPSIT.

C. Indebitatus, where maintainable in respect of special contract.

In assumpsit for repairs; proof, a special contract, but extra work; and held that the extra work is recoverable without a special count; aliter that done under the contract. *Robson* v. *Godfrey*, 1 Stark. 275. Gibbs, C. J. 1816.

D. Indebitatus for money paid.

D. (b) *Against co-surety.*

In an action by one defendant in assumpsit against a co-defendant for contribution (when the former action was for the recovery of a *debt*) the postea is evidence of the amount of the damages. *Foster* v. *Compton*, 2 Stark. 364. Abbott, J. 1818.

But the master's allocatur on the postea, is not sufficient to entitle the plaintiff to recover half the costs without producing the judgment; comme semble. *Ibid.*

E. Indebitatus for money had and received.

E. (c) *Upon failure of consideration.*

Where money is advanced to A. as the manager of an institution, for the purpose of purchasing shares therein, and there is no proof of a misapplication of the money by him, the person advancing it cannot recover it back from A. on the failure of the institution. To enable the person advancing to recover from A., he must shew either fraud in the receipt of the money, or a misapplication of it. *Lloyd* v. *Sandilands, Clerk*, 1 Gow, 13. Dallas, C. J. 1818.

E. (e) *To recover money obtained by fraud.*

A post-dated cheque is drawn upon a banker; but on the day on which it purports to have been drawn, the maker informs the holder that the banker has no funds to meet the cheque, and circumstances are disclosed to the holder from which he must infer the probable insolvency of the maker. The holder, however, presents the cheque to the banker, and obtains payment of it; but

he does not communicate to the banker, (who is wholly ignorant of all the circumstances,) what had fallen within his knowledge. *Quære*, Whether under these circumstances, the holder can retain the money against the banker who made the payment under an ignorance of the real circumstances of the case. *Martin and others* v. *Morgan and Lockwood*, 1 Gow, 123. Dallas. C. J. 1819.

Afterwards decided by the court that he could not retain it. *Ibid.*

E. (h) *For money paid under legal process.*

Quod quis sciens indebitum dedit hâc mente ut postea repeteret, repetere non potest. Dig. 12. 6. 50.

ATTORNEY.

B. Bill of costs.

B. (a) *Delivery of*

Where a defendant employs an attorney to render him in discharge of his bail, and before the business is completed, the bail requests the attorney to proceed, and undertakes to pay the subsequent costs, the engagement must be in writing. *Barber* v. *Fox*, 1 Stark. 270. Ellenborough, C. J. 1816.

B. (b) *To whom.*

Delivery of an attorney's bill to the attorney of the party to be charged sufficient, if the party himself attend the taxation, or the bill be shewn to have come to his hands. *Warren, gent. one, &c.* v. *Cunningham*, 1 Gow, 71. Dallas, C. J. 1819.

AUCTION.

A. Rights and liability of auctioneer.

A. (c) *Liability to vendee.*

Landlord gives notice that he will re-enter, unless the premises are put into repair within a period specified in the lease. An auctioneer selling the lease is bound to state the notice, though the vendee is aware of the ruinous state of the buildings, and it is alleged that the auctioneer was not apprized of the notice. *Stevens* v. *Adamson*, 2 Stark. 422. Abbott, C. J. 1818.

A. (d) *Liability to vendor.*

Assumpsit against an auctioneer for having rescinded a contract of sale contrary to his duty, may be supported upon the fact of the employment of the auctioneer by the plaintiff, and his sale of the goods without proof of an express undertaking on his part not to rescind the contract. *Nelson and another* v. *Aldridge*, 2 Stark. 435. Best, J. 1818.

In such case it is incumbent on the defendant to establish a legal excuse for a deviation from the usual practice, though involving the proof of a negative. *Ibid.*

BAILMENT.

B. Liability of keeper for hire.

A watchmaker is bound so to secure property placed in his hands in the way of his trade, as to protect it against depredations that may be committed by the persons in his employ. Therefore, where A. entrusted B. (who was a chronometer maker) with a chronometer to be repaired, and B. suffered his servant to sleep in the shop in which the chronometer was deposited, B. was held liable to A. for its value, B.'s servant having stolen it, and B., at the time when the theft was committed, having deposited his own watches in a more secure place than that in which the chronometer was left. *Clarke, esq.* v. *Earnshaw*, 1 Gow, 30. Dallas, C. J. 1818.

BANKRUPT.

B. ACT OF BANKRUPTCY.

B. (h) *Concerted.*

48. Nor an absenting from the dwelling-house at the suggestion of an attorney employed by the petitioning creditor to sue out a commission; though such creditor is not apprized of the steps taken. *Carter and others, assignees of Minchin and others,* v. *Toldervey.* Graham, B. Winchester Summer Assizes, 1819.

C. PETITIONING CREDITOR.

Where A. deposits with B. goods to be sold, and, on a sale being effected, the profits, after deducting the cost price, &c. are to be equally divided between them; but the loss, if any, is to be borne exclusively by A., if B. effect a sale and receive the money, the debt due from him to A. is sufficient to support a commission of bankruptcy against B. *Marson* v. *Barber and others,* 1 Gow, 17. Dallas, C. J. 1818.

D. COMMISSION.

D. (c) *How contested.*

The petitioning creditor's debt, trading, and act of bankruptcy, are sufficiently proved by the production of the commission, and the proceedings under it, in a case where the defendant is not named as assignee on the record, provided no notice under Sir Samuel Romilly's act, 49 Geo. III. c. 121. s. 10. has been given by the plaintiff. *Rowe* v. *Lant,* 1 Gow, 24. Dallas, C. J. 1818.

F. ASSIGNEES.

F. (b) *Actions by assignees.*

A bankrupt after an act of bankruptcy agrees with the defendant to whom he has delivered goods for sale, and who has accepted a bill upon the strength of the goods, to return the bill if he will return the goods, and does return the bill. The assignees may adopt this contract, and sue for the non-delivery of the goods. *Butler and another, assignees of Oakley and another,* v. *Carver and another,* 2 Stark. 433. Abbott, C. J. 1818.

F. (c) *Liability of assignees.*

A bankrupt having a lease of premises, and also a reversionary interest in them, the assignees sell his *estate and reversionary interest* in the premises. This amounts to an acceptance of the lease by the assignees. *Page* v. *Godden,* 2 Stark. 309. Ellenborough, C. J. 1818.

A bankrupt carries on the business of a coachmaker for the benefit of the creditors as their agent under the authority of the assignee, and orders goods in his own name which are used in the business; the assignee is liable. *Kinder* v. *Howarth,* 2 Stark. 354. Holroyd, J. 1818.

E. OPERATION OF THE ASSIGNMENT UPON PROPERTY IN THE HANDS OF THE BANKRUPT.

E. (c) *As reputed owner.*

Upon an issue whether A. had the disposition of property, after the execution of a deed of settlement, any act of dominion exercised by A. is evidence, although the parties were not privy to it. *Meyer's assignees* v. *Sefton and others,* 2 Stark. 274. Holroyd, J. 1817.

But an assignment executed without the privity of the trustee, or of the cestui que trust, is not evidence, unless acted upon and possession delivered. *Ibid.*

BARON AND FEME.

B. ACT OF WIFE, WHOM IT AFFECTS.

B. (c) *Person who passes for husband.*

After a sentence of divorce *ab initio,* the liability of a husband for the debts of his wife does not continue. *Anstey and others* v. *Manners,* 1 Gow, 10. Park, J. 1818.

BILLS AND NOTES.

A. When valid.

A. (a) *Form of bill or note.*

In declaring on a promissory note payable by instalments, if any one of the days on which an instalment is made payable be incorrectly stated, the variance is fatal. *Wells* v. *Girling*, 1 Gow, 21. Dallas, C. J. 1818.

Where the body of a bill is written, and the acceptance on it made in England; yet if it be afterwards transmitted to the drawer abroad for his signature, and it is there drawn, the bill is a foreign bill; and, consequently, does not require an English stamp. *Boehm* v. *Campbell*, 1 Gow, 56. Dallas, C. J. 1818.

* It may perhaps be doubted whether a memorandum affording evidence of the creation, not of the discharge, of a duty, can be considered as a *receipt*. This instrument seems rather to fall within the first class of promissory notes described by Pothier, *un billet par lequel quelqu'un s'oblige envers un autre à lui payer une certaine somme*, pour le prix des lettres de change qu'il lui a fournies; *Traité du Contrat de Change, part 2. art.* 1. *num.* 208.

There appears to be reason to believe that upon the first introduction of promissory notes into commerce, they were framed exclusively with reference to the contingency mentioned by this writer. The objection to such instruments may have arisen from regarding the maker of the note as standing in the place of the *drawer* of a bill of exchange. A *drawee* is allowed to impose whatever terms he pleases upon his becoming a party to the bill; and it continues to be valid and negotiable, although the holder, after contenting himself with a conditional acceptance, can sue neither the drawee nor any prior party, otherwise than upon the terms of the special contract. The situation of the holder of a bill so accepted is therefore the same as that of the indorsee of a note payable on a contingency, supposing such an instrument to have been recognized in the courts of this country.

* See page 71, A. (a) pl. 2.

A. (c) *Alteration.*

In an action by the indorsee against the acceptor of a bill, the date of which appears to have been altered by defendant, it lies on the plaintiff to show that the alteration was made previous, before the first indorsement. *Johnson and others* v. *the Duke of Marlborough*, 2 Stark. 313. Abbott, J. 1818.

D. Acceptance.

D. (a) *What shall be.*

The payee of a bill at sight leaves it with the drawee for acceptance, and a month after states that the drawee has refused to accept, and resorts to other measures for obtaining payment of his debt from the drawer; in ten days after this the drawee announces to the payee that he has destroyed the bill, conceiving it to be of no use. This is not an acceptance. *Jeune* v. *Ward*, 2 Stark. 326. Ellenborough, C. J. 1818.

And the court, Ellenborough, C. J. dissent: set aside a verdict for the plaintiff. *Ibid.* and 1 B. & A.

A letter from the drawee to the drawer communicated to the payee after he had indorsed over, stating "your bill shall have due attention," does not bind the drawee, unless the jury find that *these ambiguous words* amounted in mercantile language to an acceptance. *Rees and another* v. *Warwick*, 2 Stark. 411. Bayley, J. Lancaster, 1818.

And the court of K. B. refused a rule to set aside nonsuit. *Ibid.*

E. Presentment for payment.

E. (b) *At what place.*

A promissory note is made payable at Guildford. A presentment at a banker's at G., the maker being absent from G. when the note became due, is sufficient evidence of a presentment to

the maker at G., as alleged in the declaration. *Hardy* v. *Woodroofe*, 2 Stark. 319. Abbott, J. 1818.

And the court of K. B. refused a rule for a new trial. *Ibid.*

G. Notice of dishonour.

G. (a) *How given.*

Proof that notice was sent either on the second or third day, by letter, is insufficient. The onus probandi being upon plaintiff, the non-production of the letter of notice by defendant affords no presumption of its being sent on the second. *Lawson* v. *Sherwood*, 1 Stark. 314. Ellenborough, C. J. 1816.

G. (b) *When necessary.*

Ignorance of the place of residence of the drawer of a bill of exchange is a sufficient answer to an objection arising out of the want of due notice of the dishonour of the bill, provided due diligence be used to discover his place of residence. *Browning and others* v. *Kinnear*, 1 Gow, 81. Dallas, C. J. 1819.

I. Action.

I. (a) *Title of plaintiff.*

Pothier asserts that blank indorsements are prohibited by the laws of all nations; *Traité du Contrat de Change*, *part.* 1. *chap.* 3. *num.* 139; and he refers to *Heineccius*, *Elem. Jur. Camb.* 11, 11, and *Savary*, *tom.* 2. *par.* 8. in support of this position. But Savary, in the passage cited, merely enumerates several codes which contain such prohibition. The French *Ordonnance de* 1673, declares all indorsements fraudulent and void which are not dated, and which do not also express the true consideration of the transfer; *art.* 23; and it makes the ante-dating of indorsements forgery; *art.* 26; *Pothier*, *ubi supra.* All these regulations are adopted in the *Code de Comm. liv.* 1. *tit.* 8. 56. *num.* 137, 8, 9.

A. accepts a bill for the accommodation of B., which B. delivers to C. his creditor, to provide for A. about to become due. C., before A.'s bill becomes due, returns it to B. as useless, in order that it may be forwarded to A., C. cannot, by subsequently obtaining possession of the bill, acquire a right of action against A. *Cartwright and others* v. *Williams*, 2 Stark. 340. Ellenborough, C. J. 1818.

In such case B., who has become bankrupt, is a competent witness for A., after a general release by A., although he has not been released by his assignees. *Ibid.*

And the court refused a rule for a new trial. *Ibid.*

Bills are remitted on account to plaintiffs, by the payee, for whose accommodation they were drawn. At the time of remittance the payees were greatly in arrear to plaintiffs, but the balance was in favour of the payee, when the bills became due respectively. Payees afterwards failed in debt to plaintiffs. Held, that although plaintiff's lien had ceased to attach, yet it revested by defendant's allowing the bills to remain in plaintiff's hands upon fresh advances made. *Atwood and another* v. *Crowdie and another*, 1 Stark. 483. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

BOND.

B. Damages, how assessed.

Where breaches are assigned in the declaration, and non est factum is pleaded, the jury may assess the damages under the common venire. *Parkins and another* v. *Hawkshaw*, 2 Stark. 381. Abbott, J. 181 .

CARRIERS.

C. Conveyance of goods.

C. (b) *To what extent.*

A notice by carriers that they will

not be answerable for any goods above the value of 5l. unless entered as such and paid for accordingly, applies to goods which from their bulk may be supposed to exceed the specified value. *Thorogood* v. *Marsh and Swann*, 1 Gow. 105. Dallas, C. J. 1819.

A notice by carriers that they will not be accountable for the loss or damage of goods, unless the terms of the notice are complied with, protects them as well against a loss by robbery as against an accidental loss. *Covington* v. *Willan and others*, 1 Gow, 115. Dallas, C. J. 1819.

DEBTOR AND CREDITOR.

B. How discharged.

The mere circumstance of a cheque being made payable to A. and of A.'s having received payment of it, is not evidence that the maker gave it to him. *Lloyd* v. *Sandilands*, 1 Gow, 15. Dallas, C. J. 1818.

DEED.

D. Fraudulent.

When a grant made by a prisoner a a fortnight before his trial for felony, purporting to be in trust to pay debts, is set up, the debts, or consideration for the deed, must be proved. *Shaw* v. *Bran*, 1 Stark. 319. Ellenborough, C. J. 1816.

DONATIO MORTIS CAUSA.

In *Bunn* v. *Markham*, 7 Taunt. 226, "Gibbs, C. J. desired that case" (*Sprattley* v. *Wilson*, ante, page 112) "might be laid out of the consideration of the plaintiff's counsel, for that immediately after that trial, he perceived that what he had somewhat improvidently thrown out, could not be maintained, because a delivery was wanting."

EXTENT.

Quære, Whether an extent, delivered to a sheriff on the day on which goods seized under an execution are sold and delivered to the purchaser, but which extent is delivered subsequently to the sale and delivery of the goods, be entitled to priority over the writ of execution? *Swain* v. *Morland, Esq.* 1 Gow, 39. Dallas, C. J. 1818.

The court held that the extent came too late, 1 B. & B. 370; and see *Thurston* v. *Mills*, 16 East, 254; *Rex* v. *Allnutt*, *ibid.* 278, n. *Rex* v. *Sloper*, Manning's Exch. Prac. 543; *Rex* v. *Giles, Esq. sheriff of Herts, in the case of Rex aux. Groves* v. *Fourdrinier*, *ibid.* 633; see also F. N. B. 78 B.; Collis, 159, b; 1 East, 338; West, 151, 2.

FOREIGN ATTACHMENT.

A. To what persons the custom extends.

A. (c) *In respect of the locality of the cause of action.*

To give the Lord Mayor's court jurisdiction it is not sufficient that the garnishee resides within the city: the cause of action must also have accrued there; as appears by the following order made by the present chancellor in *Traub and others* v. *Schmidt*, 19th Dec. 1817.

"Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor of Great Britain, by Sir Samuel Romilly, Mr. Bolland, and Mr. Palmer, of counsel for the defendant. It was alleged that it appears by the affidavit of John Barrow, the defendant's solicitor, that in the month of March, 1814, a plaint was

affirmed in the Mayor's court, of the city of London, at the instance of the above-named plaintiffs, against the defendant, in a plea of debt upon demand for 10,000l., and process of attachment at or about the same time also issued out of the said court of the sum of 5000l. of the proper monies of the said defendant, then in the hands and keeping of one Samuel Henderson; that the said defendant then resided at Hamburgh, by reason whereof he was not summoned to appear and answer to the said plaint, and such proceedings were thereupon had in the said action against the said S. H. the garnishee; that the said plaintiffs, on or about the 2d day of April, 1814, obtained a verdict against the said S. H. for the said sum of 5000l. and which was afterwards paid by him to the agent of the said plaintiffs, upon John Boswell the solicitor employed for the said plaintiffs in prosecuting the said attachment, and John Diston Powles, of London, becoming sureties to restore the said 5000l. to the said defendant, in case he should, within a year and a day thence next ensuing, come into the said court, and find sufficient bail and sureties to have the body of the said defendant to answer the said plaintiffs in and upon the said plea, and to disprove or avoid the said debt, according to the custom of the said city, or render his body to prison within the liberties of the said city, and there remain ready to plead with the said plaintiffs in and upon their bill, original or demurrer, to discharge himself therefrom; that the said John Barrow believes that the said defendant had no knowledge, nor any information whatever of the said plaint, or attachment, or of any proceedings under the same, until some time after the verdict had been obtained, and the said 5000l. paid as above-mentioned; (Hamburgh, where the defendant resided and still does reside, being then under the dominion of the French government, which had prohibited all intercourse between persons resident there and this country;) that the said defendant, did, within a year and a day, come into the said court, and find sufficient bail and sureties, according to the custom of the said city of London, in that behalf, and brought his scire facias to disprove the said debt, demanded by the said plaintiff, by the bill, original or demunire, to discharge himself thereof according to the custom of the said city, and that the said plaintiffs appeared thereto; and the said defendant thereupon, by the advice of counsel, pleaded that the cause of action (if any accrued to the said plaintiff) did not accrue within the jurisdiction of the said court; and to which plea the said plaintiff replied that as to part of the said debt in the said plaint mentioned, and of the cause of action of the said plaintiffs, (to wit, 2100l. part thereof,) that the said cause of action did accrue within the jurisdiction of the said court, and that as to the residue of the said debt, that the said S. H., the garnishee, resided within the said city, and within the jurisdiction of the said court; that the said defendant joined issue as to so much of the said replication, as related to the said sum of 2100l. and the cause of action accruing within the jurisdiction of the said court; and as to other part of the said replica-cation, the said defendant demurred thereto, as being insufficient in law, and that the said demurrer was argued before the said court, on behalf of the said plaintiffs and defendant, and judgment was given thereon, for the said defendant, on the 21st Nov. 1816; that the said issue, whether the cause of action as to the said sum of 2100l. arose within the jurisdiction of the said court, was set down to be tried on the 9th day of July, 1816, but the same was then and at sundry times afterwards, postponed until the 5th day of May past; and when the said cause came on to be tried before the Recorder of the said court, and after various witnesses had been examined upon such trial for the said plaintiff, a verdict was thereupon given for the said defendant; that in the month of March past the said plaintiffs presented a petition to the Lord High Chancellor, thereby alledging that after the said defendant had come into the said court, and appeared as aforesaid, instead of disproving the said debt he pleaded in bar to the jurisdiction of the said court, and that the validity of such plea was argued before the Recorder of London, on a demurrer by the

said defendant to the said plaintiff's replication to the said plea, and that the said Recorder gave judgment for the said defendant upon such demurrer, and praying that a commission of error, under the Great Seal of Great Britain, and also a writ of error, for the purpose of correcting errors in such judgment, might issue, and that such commission of errors might be directed to such learned judges as his lordship might think proper; whereupon his lordship, on the third day of the said month of March, ordered that the Cursitor of London should make out such commission as was prayed. directed to Sir Vicary Gibbs, knt. Lord Chief Justice of the Common Pleas, the Lord Chief Baron Thomson, Mr. Justice Abbott, Mr. Justice Burrough, and Mr. Baron Richards, or any two or more of them, together with such writ of error, as was by the said petition prayed; that in pursuance of the said order the said Cursitor did accordingly make out such commission of errors, directed to the said justices, and also a certain writ, bearing date the 5th day of March last, directed to the Mayor, Aldermen, and Sheriffs of London, thereby commanding the said Mayor and Aldermen, at a certain day, which the said justices should make known, the record and process of the said plaint and attachment, and giving of attachment of the said plaint and judgment, and also the adjudging of execution thereupon, with all things touching the same, which remained with them, before the said justices, or two of them, to the same place, they caused to be brought, and commanding the said sheriffs that a certain day, which the said justices, or two of them, should make known to them, they should give notice to the said plaintiffs, that they be there, of any error in the said record and process, or giving of judgment thereupon, which is known to belong thereto, and to hear further, and to do and perform what should be ordered by the said justice in the said case to be done; that the said writ was, on the 5th day of May last, presented to, and allowed by the deputy register of the said Mayor's court, in the city of London, whereby the said defendant has been prevented from obtaining the fruits of the said judgment, so as aforesaid obtained by him; and that the said plaintiffs have not taken any further proceedings upon their said writ of error, since the same was allowed on the 5th day of May last, as aforesaid, and particularly the said J. B. saith, that within the last week he hath caused inquiries to be made at the chambers of the said Sir Vicary Gibbs, the Lord Chief Baron Richards, Mr. Justice Abbott, and Mr. Justice Burrough, four (a) of the several judges named in the said commission, to ascertain whether any application had been made to them respectively on the parts of the plaintiffs to proceed under the said commission, when he the said J. B. was informed, and as he believes, no such application had been made to the said judges, or any of them, nor any notice given to them respectively of such writ of error and commission, or either of them, having so issued as aforesaid, and believes that the said commission and writ of error respectively have been sued for and obtained by the said plaintiffs, for the mere purpose of delay; that on the 5th day of December, instant, he the said J. B. applied on behalf of the said defendant to the proper officer of the said court for a writ of execution against the said John Boswell and John Diston Powles, for the said sum of 5000l., and to which the said defendant has become entitled, according to the custom of the said city of London, and practice of the said court, by virtue of such verdict and judgment so obtained by him as aforesaid, in case the said writ of error had not been issued out, as he believes, but which he refused to issue for the said sum of 5000l., or any part thereof, by reason of the said writ of error having been so issued and allowed as aforesaid; and saith he hath been informed, and believes, that the said John Boswell, one of the said sureties for restoring the said 5000l., hath absconded from this country to, and that he is now in North America; it was therefore prayed that the commission of errors issued in this cause under the Great Seal of Great Britain, and directed to the said Sir Vicary Gibbs, &c., and also the writ of error in like manner issued in the said

cause, and directed to the Mayor, Aldermen, and Sheriffs of London, bearing date the 5th day of March last, might be superseded, or that the said Mayor and Aldermen might be directed to carry into effect, and enforce the judgment and verdict respectively given for the said defendant against the said plaintiffs, in the Mayor's court of the city of London, on or about the 21st day of November, 1816, and the 5th day of May now last past, respectively, notwithstanding such commission and writ of error as aforesaid, and that for that purpose the necessary writ or writs might be awarded and issued, directed to the said Mayor and Aldermen. Whereupon, and upon hearing the said affidavit of Joseph Keech, and an affidavit of Henry Ashley, read, and Mr. Leach and Mr. Bell, of counsel for the plaintiff, his lordship doth order that the writ of error issued in this cause, and directed to the Mayor, Aldermen, and Sheriffs of London, bearing date the 5th day of March, 1817, be superseded. And it is ordered that the plaintiffs do pay unto the defendant his costs of this application, to be taxed by Sir J. Simeon, bart., one of the Masters of this court, in case the parties differ about the same."

See the previous proceedings reported, 3 Meriv. 632.

This application to the Chancellor was suggested principally upon the authority of a note subjoined to the writ of error in London, in the Register "Et est de gratiâ speciali." Reg. Brev. 131, a.

Upon the supersedeas being granted, the money attached (5000l.) was paid to the defendant's agent.

As to the proceedings on writs of error from the city courts, see P. 34. H. 6. fo. 42. pl. 14; Bro. Error, pl. 18; F. N. B. 21, 23, 24, A. B.; *Greene* v. *Cole*, 2 Saund. 152. *Mayor of London* v. *Markwith*, 9 Vin. Abr. 486.; S. C. 2 Brown, P. C. 409. 2d edition; and see Peycocke's case, H. 18. E. 3. fo. 1. pl. 5. in fine. As to the supersedeas, see *Birch* v. *Triste*, 8 East, 411. As to the issuing of execution, notwithstanding the pendency of proceedings to stay it, see *Wilkins* v. *Mitchell*, 3 Salk. 229; F. N. B. 20; *Kempland* v. *Macauley*, 4 T. R. 436; *Levett* v. *Perry*, 5 T. R. 669; 2 Wms. Saund. 101, h. And as to the quashing of writs of error, see *Barlow* v. *Collins*, 1 Peere Wms. 436, n.; *Dean, &c. of Dublin*, v. *Dowgatt*, *ibid.* 348. S. C. 3 Brown, P. C. 506. See also *Brewer* v. *Turner*, 1 Stra. 233; *Cooper* v. *Ginger*, *ibid.* 606; Com. Dig. Pleader, 3 B. 12; 20 Vin. Abr. tit. Supersedeas; 1 Schoales and Lefr. 75.

(a) Thomson, C. B. had died.

FOREIGN LAWS.

And see post, NATURALIZATION.

An act of Tynwald, promulgated on Tynwald Hill, March, 54, 1814.

"Whereas, by an act of Tynwald, promulgated in the said isle, in the year of our Lord 1737, it is amongst other things enacted and provided, "that any person prosecuted in this island for a foreign debt, by an action of arrest in this Court of Chancery shall, for the future, be held to bail only for his personal appearance to such action, and for the forthcoming of what effects he hath within this island.

And whereas it is expedient that foreign debts shall be recoverable in the said isle, in such and like manner as debts contracted within the same. We, therefore, your majesty's most dutiful and loyal subjects, the Lieutenant Governor, Council, Deemsters, and Keys, of the said isle, do humbly beseech your majesty, that it may be enacted and be it enacted by the king's most excellent majesty, by and with the consent of the Lieutenant, Governor, Council, Deemsters, and Keys, of the said isle, in Tynwald assembled, and by the authority of the same, that from and after the promulgation of this act, all debts contracted out of the limits of the Isle of Man shall be recoverable in the said isle, in such and the like manner, to all intents and purposes, as if such debts had been contracted between the said parties, within the limits of the said isle.

Provided always, that nothing hereinbefore contained shall extend or be con-

strued to extend to affect any person, who, at the promulgation of this act, shall have been usually resident within the said isle, for and during the space of six months immediately preceding the day of the promulgation thereof, or who hath been usually resident within the said isle for one year before the commencement of the said six months, and who hath departed the said isle in the service of government, civil or military, with an intention to return to the said isle as the place of his abode."

FRAUDS, STATUTE OF.

A. Leases.

A. (b) *How assigned.*

The statute 29 Car. 2. c. 3. s. 4. does not invalidate an executed parol contract so as to prevent a party to it from maintaining an action for a breach of it, where the breach does not relate to an interest in land, although the contract itself stipulates that the defendant should be substituted as tenant in the stead of the plaintiffs, of premises then in their occupation. *Price and another* v. *Leyburn*, 1 Gow. 100. Dallas, C. J. 1819.

A. (c) *How surrendered.*

The substitution of a new tenant with the assent of the landlord and former tenant, operates as a surrender in law. *Stone* v. *Whiting*, 2 Stark. 225. Holroyd, J. 1817.

A., by parol, lets to B., who underlets to C.; A., with B.'s assent, accepts C. as his tenant, and receives rent from him; A. cannot afterwards recover against B.; the demise to C. operating as a surrender in law of the estate of B. *Thomas* v. *Cooke*, 1 Stark. 408. Abbott, J. 1818.

And the court refused a rule, to set aside nonsuit. *Ibid.* S. C. 2 B. & A. 117, where it is stated, that a verdict has been found for the defendant.

D. Promises on behalf of third Persons.

D (b) *Collateral undertaking.*

And see post, page 376.

Where a defendant employs an attorney to render him in discharge of his bail, and, before the business is completed, the bail request the attorney to proceed, and agree to be answerable for the further costs, the agreement must be in writing. *Barber* v. *Fox*, 1 Stark. 870. Ellenborough, C. J. 1816.

A letter of the defendant without date, states, "I have no objection to guarantee the payment of the rent, as far as that of each quarter, during T. W.'s continuance in possession." T. W. rented certain premises of plaintiff. This is not sufficient, without shewing that the plaintiff accepted the defendant's offer. *Symmons* v. *Want*, 2 Stark. 371. Holroyd, J. 1818.

INFANT.

B. Where liable to action.

B. (b) *For necessaries.*

An account stated by an infant cannot be used even as an admission that the demand is for necessaries. *Ingledew* v. *Douglas*, 2 Stark. 36. Ellenborough, C. J. 1817.

C. Plea of infancy.

C. (a) *How supported.*

The proof lies upon the party who alleges the non-age. *Jeune* v. *Ward*, 2 Stark. 328, 330. Ellenborough, C. J. 1818.

S. C. not S. P. 1 B. & A. 653. S. P. *Bertey* v. *Dormer*, 12 Mod. 526.; and see 13 Vin. Abr. 4. T. (b). *Cory* v. *Gertchen*, 2 Madd. 40.; Chitty on Bills, 229, 5th edit.; Peake's Evidence, 297.

An infant borrows money, and B. is bound to pay it for him at his full age, and the infant doth then promise to save him harmless; and it was held good, for, albeit, the infant is not bound

in law, yet is he bound in conscience. Trin. 29 Eliz. B. R. 1 Sheppard's Abr. 106.

As to considerations binding in conscience only; see *Lee* v. *Muggeridge*, 5 Taunt. 36. *March* v. *Culpepper*, 3 Cro. 70. Lord Grey's case cited, 1 Leon. 114, Case, 156.

INFORMATION.

(And see ante, EVIDENCE, pl. 10, 12, 13; LIBEL, B.; SMUGGLING, pl. 1; VARIANCE, pl. 1, 46, 70; post, PRACTICE, M. (d).

When the party appears upon a summons upon an information for an offence against the excise, the information must be read to him. It is not sufficient that the substance of the charge is stated to the defendant, he must have an opportunity of objecting to the form of the information. And for this omission the court made absolute a rule for a certiorari to remove a conviction of selling cyder without a licence. *Rex* v. *Hern*, K. B. T. T. 1819.

Walton for the crown, Manning for the defendant.

INSURANCE.

G. WARRANTIES.

G. (c) *Neutrality*.

A warranty to carry a French licence, is not satisfied by proof of a licence bearing the signature of Napoleon and countersignature of his minister, received by the captain from his owners, at Dantzic, but not shown to have come from a French authority. *Everth* v. *Tunno*, 1 Stark. 508. Ellenborough, C. J. 1816.

But the papers having been seized in a French port, and detained a month without objection, they were presumed to be genuine. *Ibid.*

INTEREST OF MONEY.

"Il convient que la loi fixe un intérêt, mais c'est pour les cas seulement où il est dû sans qu'il y ait eu de convention préalable, comme lorsqu' un jugement ordonne la restitution d'une somme avec les intérêts. Il me semble que ce taux doit être fixé par la loi au niveau des plus bas intérêts payés dans la société, parceque le taux le plus bas est celui des emplois les plus sûrs. Or la justice peut bien vouloir que le détenteur d'un capital le rende, et même avec les intérêts; mais pour qu'il le rende, il faut qu'elle le suppose encore entre ses mains, et elle ne peut le supposer entre ses mains qu'autant qu'il l' a fait valoir de la manière la moins hasardeuse, et par conséquent qu'il en a retiré les plus bas de tous les intérêts." J. B. Say, Traité de l'Economie Politique Livre, II. c. 8. s. 1. 2d vol. p. III, 2d edition, 1814, (p. 122, 3d edition, 1817.) But with unfeigned deference to the opinion of the author of this most luminous and masterly publication, it is at least questionable whether the creditor ought not to recover according to the inconvenience which *he* has sustained in being deprived of the use of his capital, without reference to the advantage reaped by the detaining debtor. The reasoning of Say is, however, in some degree, still applicable. For should the creditor urge that he could have obtained that than the lowest rate of interest, the answer would be, the means resorted to for the purpose of increasing that interest might, according to the above principles, have involved the loss of the principal.

The present observations are offered merely for the purpose of pointing out the confusion which has arisen and still exists, in consequence of not attending to the original signification of the words interest and usury; between which the true distinction seems to be this:—The latter is a compensation paid for the advantage which a party derives or is supposed to derive from the use of the capital which he hires; whilst the former is an indemnity claimed by the

lender or other creditor, for the loss and inconvenience which *he* sustains. It is obvious that this definition has nothing to do with the modern legal notion of usury and interest, according to which the exaction of 6 per cent. by a lender, who has sacrificed as much in order to enable him to make the advance, though he receives strictly *quid suâ* INTEREST, is called usury, while 5 per cent. reserved by a person whose money would otherwise produce less, or perhaps be unemployed is *legal* interest. Without attending to this natural distinction, however, it seems impossible to decide the question, or even to understand the argument as to the lawfulness in foro conscientiæ of exacting usury in respect of capitals advanced not for the purpose of being employed reproductively by the borrower, but with a view to immediate unproductive consumption.

The civilians and canonists, who assert the unlawfulness of usury under any circumstances appear to labour under another mistake. They consider a loan of money as the loan of a thing which is intended to be consumed by the borrower in all cases, inasmuch as he can derive no benefit from the sum advanced if he retain it in specie. The fallacy seems to arise from not considering that where money is advanced for the purpose of being employed in trade, manufactures, or agriculture, the coin or notes paid by the lender are merely the medium of transferring to the borrower a certain portion of the lender's capital, which, though it is seen only momentarily under the form of money, continues to exist under different shapes during the loan, and until it is restored to the lender with the stipulated proportion of its accretions in the pecuniary form in which it was advanced.

JUSTICES OF THE PEACE.

A. Their authority.

Semble, that a magistrate has the power of apprehending and of requiring bail of a libeller, and for want of it of committing him. *Butt* v. *Conant, Knt.* 1 Gow, 84. Dallas, J. 1819.

Upon a special verdict, judgment was given for the defendant. 1 B. & B. 548.

Semble, that notwithstanding the stat. 31 Geo. 3. c. 46. s. 5. a secretary of state has the power of preventing those magistrates who are not visiting magistrates from having access to state prisoners. *Rex* v. *Eaststaff.* 1 Gow, 138. Park, J. Reading, 1818.

LEGACY.

A. bequeathes to B. 1200*l.* and appoints C. executor of her will. C. has sufficient assets, but does not pay the legacy to B. C. afterwards makes his will, by which he bequeaths to B. an annuity of 700*l.* and expresses it to be "in satisfaction of the debt or sum of 1500*l.*" but which annuity B. does not accept. Held that the 1500*l.* is money had and received to the use of B., and may be recovered in that form of action.* *Ann Gorton and another, executrix and executor, &c.* v. *Thomas Dyson and another, Executors, &c.* 1 Gow, 78. Dallas, C. J. 1819.

And the court refused a rule for a new trial on this point, 1 B. & B. 219.

LIBEL.

A. Civil action.

A. (a) *In what oases maintainable.*

Every *unauthorized* publication to the detriment of another, is, in point of law, malicious. *Brown* v. *Croome*, 5 Stark. 297, 301. Ellenborough, C. J. 1817.

Consequently, an advertisement, reflecting on the plaintiff's character; though inserted for the purpose of calling his creditors together for a legitimate purpose; provided the object could have

been accomplished without such a publication, or in more guarded language. *Ibid.*

And see ante, LIBEL, pl. 10, 43-4-6.

A paragraph in one newspaper charging another with fraud, is actionable. *Stuart* v. *Lovell*, 1 Stark. 93. Ellenborough, C. J. 1817.

A defendant is not responsible for a libellous letter written by one who is in the habit of writing his letters of business, without proof of his having adopted the libel. *Harding* v. *Greening*, Holt, 531. Gibbs, C. J. 1817.

And the court discharged a rule for setting aside nonsuit, 1 Moore, 477.

A. (c) *Evidence.*

It is no defence that the particular facts charged were communicated to the defendant by a third person. *Mills and Wife* v. *Spencer and Wife*, Holt, 533. Gibbs, C. J. 1817.

And see Lord Northampton's case, 12 Co. Rep. 133; *Maitland* v. *Goldney*, 5 East, 426.

Upon the general issue, the plaintiff cannot give evidence to disprove the truth of the libel. *Stuart* v. *Lovell*, 5 Stark. 93. Ellenborough, C. J. 1817.

But in another case it was said, that such evidence, though clearly admissible, would give liberty to the defendant to show the libel to be true. *Brown* v. *Croome*, 5 Stark. 597. Ellenborough, C. J. 1817.

Nor can he produce other libels to show the quo animo, unless the intention is equivocal. *Stuart* v. *Lovell*, *ubi supra.*

B. CRIMINAL PROSECUTION.

B. (d) *Evidence.*

An allegation that a letter was written with intent to injure the prosecutor in his profession cannot be supported if the letter were sent only to the prosecutor. *Rex* v. *Wegener*, 1 Stark. 543. Abbott, J. 1817.

The charge should have been of an intention to excite the prosecutor to break the peace. *Ibid.*

LIMITATION OF ACTIONS.

A. IN ASSUMPSIT.

A. (a) *From what time to be computed.*

Quære, whether there is any limitation to an action for contribution against a co-obligor; see Brooke upon Stat. Lim. 15. cited C. D. Temps. 611.

A. (d) *Where waved.*

A bare acknowledgment of the debt is not sufficient. *Lara* v. *Bird.* Peake's Evidence, 197, 1791.

C. IN EJECTMENT.

(a) *From what time to be computed.*

A. being lessee in remainder, expectant upon the determination of a prior lease, dies intestate. Administration is not taken out until after the expiration of the first lease. As against a party claiming under A., the adverse possession must be considered as commencing from the moment the first lease expired, and not from the grant of administration. *Fairclaim* v. *Little.* Burrough, J. Salisbury Summer Assizes, 1818.

N. Where the statute once begun to run, no disability in a party to whom the right may devolve before the twenty years have elapsed, will impede the course of the statute; 4 Taunt. 826. Plowden, 347, 370; 4 T. R. 300, 306, n.; 6 East, 80.

LITERARY PROPERTY.

D. ASSIGNMENT OF COPYRIGHT.

The acquiescence of the author in the publication of the work is not evidence of an assignment to the purchaser. *Latour* v. *Bland and another*, 5 Stark. 385. Abbott, J. 1818.

Nor a receipt given by the author for money paid to him as the price of his copyright. *Ibid.*

MISDEMEANOR.

A. What shall be.

A. (a) *Conspiracy.*

To support an action for a conspiracy in issuing a commission of lunacy, malice and a want of probable cause must be proved. On proof of a total want of probable cause malice may be implied; but, although express malice be proved, some slight evidence of a want of probable cause must be given. *Turner, Bart.*, v. *Turner and others*, 1 Gow, 50. Dallas, C. J. 1818.

NATURALIZATION.

A. Distinction between Denization by Letters Patent and Naturalization by Parliament.

In an action depending in the French courts between J. L. P. Brunet and a British officer of high rank, the question was, whether Brunet, by accepting letters of denization in England, (though he had since returned to France,) had so far lost the rights of a French citizen as to be incapable of suing a foreigner upon a cause of action arising out of France.

The Code Civil contains the following provision (a) :—

" La qualité de Français se perdra, 1°, par la naturalisation acquise en pays étranger; 2°, par l'acceptation non autorisée par le roi de fonctions publiques conferées par un gouvernement etranger; 3° enfin par tout établissement fait en pays étranger sans esprit de rétour.

" Les établissemens de commerce ne pourront jamais être considérés comme ayant été faits sans esprit de rétour."

Upon the construction of this clause, the Cour de Cassation decided that the letters of denization did not amount to a " naturalisation acquise en pays étranger." The court considered the denization as an imperfect and *incipient* naturalization, founding their judgment upon an opinion produced from England, stating, that no " naturalization" could be obtained in that country without an act of parliament.

The importance of the question will, it is presumed, excuse the introduction of the following observations.

The word " denizen," in its proper and original sense, served to distinguish the persons born within the allegiance of the King of England from foreigners. Sometimes, though less frequently, it was applied to the natives of a borough, &c. possessing certain privileges and franchises from which strangers, though English subjects, were excluded.

The word denization signifies a grant of the quality of natural subject, which, by the laws of England, the king alone has the right to confer.

It is true, that in a more modern and less proper sense, the word " denizen" has been used to designate a foreigner who has become a subject by letters of denization; in which latter sense, the word denizen is now used in common language and in acts of parliament. In ordinary conversation, the word " denizen," in its proper signification, is become obsolete, if that term can be applied to a word, which, in ordinary conversation, occurring in England, was at no period likely to suggest itself to the mind of the speaker.

By obtaining letters of denization the foreigner acquires the rights of one who is born a subject, and contracts the same obligations. But the King of England has not the power of granting to any even of his own subjects, privileges which would prejudice the rights of other subjects. Letters patent of denization, therefore, cannot possess a retrospective operation, or disturb any rights already vested in third persons. On this account, Brooke, C. J. says, " Nota pro lege anno, 36

(a) Art. 17.

H. 8. that if a foreigner come to England and bring his son with him, who was born beyond the sea, and is an alien as is his father, there the king cannot, by his letters patent, make the son heir to his father nor to any one else, *for he cannot alter the laws by his letters patent*, nor in any way except by parliament, *for he cannot disinherit the right heir nor disappoint the lord of his escheat* (a)."

Where such a retrospective operation is desired it is necessary to apply to parliament, who, in naturalizing a foreigner, must be considered not as *administering* the law but as dispensing with it, or rather as making a new law pro hâc vice. Besides which, as every act of parliament is presumed to include the consent of the whole nation, those who would have inherited or who might have entered pro defectu hæredis if the naturalization had not been effected, are not at liberty to consider themselves aggrieved even by the operation of a law which places the party in the same situation as if he had been actually born in this country. This induced the Court of C. P. to declare, "that an act of naturalization is not to be extended by equity, since it carries with it somewhat of injustice, inasmuch as it may have the effect of disinheriting natural subjects." And the Chief Justice, Sir O. Bridgman, added, "that such a kind of naturalization is contrary to the systems of other states in France, where those who are naturalized cannot enjoy the same privileges (b).

The distinction between naturalization by act of parliament and denization by letters patent is expressed in a few words in an argument in Carter, 169. "Naturalization is an adoption, by means of which a foreigner acquires, by right of birth, all which an Englishman can claim. Naturalization acts from the time of birth; but denization does not begin to be in force except from the date of the letters patent."

In another case it is said, that "naturalization is always made in parliament and is perpetual, for if a man be naturalized for one hour he is so for ever (c)."

It would indeed be a contradiction to maintain that naturalization by act of parliament has reference to the moment of the party's birth, and yet that it can be limited to a single hour. On the same principle, a release given by a creditor to his debtor is absolute, even though it purport to be available only for a limited period, or to be on condition.

But, as letters of denization do not proceed upon this fiction of making a person a subject from the time of his birth, they are capable of admitting restrictions; and, it is possible to imagine such restrictions to be imposed upon the grant as to confer only in an incomplete manner, the quality of a British subject. But though such a case may be supposed, it does not appear ever in fact to have existed.

It is required by statute (32 H. 8. cap. 16. s. 7.) that in all letters patent of denization a clause be inserted, importing that they shall be void, if the party engages in any unlawful trade, or does not obey the laws of the realm. But this appears to be merely in terrorem. "If an alien be made a denizen, and the letters of denization have a proviso, (as is usual in such charters) that the denizen shall do his liege homage, and that he shall be obedient and observe the laws of the realm, this proviso does not amount to a *condition*, for, although he never does homage, and does not obey the laws, this shall not make the denization void, for if he does not observe the laws he shall suffer the penalties which they impose (d)."

Denization, therefore, appears to be a perfect *prospective* naturalization. The only difficulty in the question seems to arise from the peculiar mode in which the latter word is used in English juris-

(a) Bro. Abr. tit. Denizen et Alien, pl. 9.

(b) *Collingwood* v. *Pays*, 1 Sid. 197. In this case it was decided, that even an act of parliament was not co-extensive in its operation, with actual birth; since the former, before the union, only made the party a natural subject in that state, (e. g. Ireland) in which the act passed, leaving him an alien in the other two, (England and Scotland.)

(c) *Godfrey* v. *Dixon*, 2 Rolle's Rep. 95. Cro. Jac. 539.

(d) 1 Roll. Abr. 195. Pasch. 8 Jac. in Scaccario; Verselius Manning's case.

prudence. The English constitution has always regarded the power of adopting new members into the state as an inalienable prerogative of the crown; and, strictly speaking, the exercise of this right by the king alone by his letters patent of denization is the only mode of adoption which the law recognizes. When a man is naturalized by act of parliament, in addition to that denization which the king confers at the moment the royal assent is given to the bill, he obtains some collateral advantages by a new law made pro re natâ, to which, under the existing laws, he could not through any means attain. These advantages thus gained emanate from the same authority, which, by a similar though less usual exercise of its power, may declare the city of Quebec to be part of the County of Middlesex.

A person who has obtained letters of denization has at all times been considered as enjoying the same rights, privileges, and immunities, and as contracting the same obligations as a natural born subject (e).

(e) Thus in *Nichols* v. *Nichols*, Plowden, 482-3, it is said, "the Lord Dyer cited a case which he said was in Frowick's reading, and was thus:—A man makes a lease for years, of land, to an alien, upon condition that if the alien pays to the lessor such a sum of money during the lease, then he shall have the fee, and afterwards the king makes him a denizen, and after that he pays the money, and all this matter is afterwards found by office, in this case, he said, that Frowick was of opinion, that the king should have the fee. But, (with submission) says this very learned reporter, it seems to me that the law is not so; for, when the condition was, that upon the payment he should have the fee, the fee shall not vest until the payment; for, although the condition shall have relation to the livery for the avoiding of incumbrances, yet, as to the vesting of the fee, it should only have relation to the time of the payment; for the condition was, that if he paid the money, then he should have the fee, and he could not have the fee before; and then, when the fee vested in him, he was a *natural subject*, and had capacity to take as a subject. So that the time when the condition was made, is not so much to be regarded as the time when the fee vests, and when it vested in that case, the lessee was capable as a subject."

By 43 Geo. 3. cap. 155. sect. 21. aliens, who are the domestic servants of natural born subjects, denizens, and persons naturalized, are exemted from the operation of the Alien Act, and the 36th section in like manner classes denizens with natural born subjects and persons naturalized, placing them as before in the middle.

The registry acts require the party applying for a register to swear that he is bonâ fide a subject of Great Britain The form of the oath then goes on to negative that the party has taken the oath of allegiance to a foreign state, or, if he has taken such oath, to state that he is since *become a subject* by letters of denization, or by naturalization by act of parliament. Thus a denizen who has taken the oath of allegiance to a foreign power must swear that he has since become a subject by denization, but as nothing is said respecting denizens who have not taken such oath, it follows that they must swear simply that they are bonâ fide subjects. If this were not so, denizens who had taken the oath of allegiance to a foreign power, would be placed on a better footing than those who had not.

OFFICER.

B. Authority.

A person convicted of a crime by a court of competent jurisdiction is sentenced to pay a fine, and is committed in execution until that fine be paid. Although the officer to whose custody he is committed voluntarily permit him to escape before payment of the fine, yet it is afterwards his bounden duty to retake him. *Bull* v. *Jones, Esq.*, 1 Gow, 99. Dallas, C. J.

C. Privileges.

C. (a) *As defendants.*

A gaoler receiving and detaining a person under the warrant of a magistrate, is intitled to the protection of the 54 Geo. 3. c. 44.; and, therefore, on producing and proving the warrant under which the detention was made, it is immaterial whether or not the magistrate had jurisdiction to grant it. *Butt* v. *Newman*, 1 Gow, 97. Dallas, J. 1819.

PARTNERS.

A. What shall be a Partnership.

A. (b) *With respect to strangers.*

Si margarita tibi vendenda dedero, ut, si ea decem vendidisses, redderes mihi

decem; si pluris, quod excedit tu haberes: mihi videtur, si animo contrahendæ societatis id actum sit, PRO SOCIO *esse actionem; si minus, præscriptis verbis; Dig.* 17, 2, 44. In this passage the *animus contrahendæ societatis* appears to be opposed by Ulpian merely to a *voluntary gift* of the contingent profit, made without reference to any beneficial exertions on the part of the person effecting the sale; see *Pothier, Traité du Contrat de Societé, chap.* 1. *sect.* 3. *num.* 13. A distinction of a nearly similar nature is made by Julian; Dig. 17, 1, 52. In the case of *Benjamin* v. *Porteus*, 2 H. Bla. 591, the broker, who was to keep for himself whatever he could get beyond a certain price, *as a reward for his trouble*, was, however, considered by Heath, J. and Rooke, J. against the opinion of Eyre, C. J. as a competent witness for his employer. And see ante, APPENDIX, BANKRUPT, C.

B. ACT OF CO-PARTNER, IN WHAT CASES BINDING.

A pledge by one partner of partnership property will bind his co-partners, although the pledge is made without their privity and consent, provided the pledgee had no notice that the property was joint property, and there be no fraud in the transaction. *Raba and Robles* v. *Ryland and another*, 1 Gow, 135. Dallas, C. J. 1819.

PEERAGE.

See ante, PRACTICE, pl. 78.

A. PLEADED IN ABATEMENT.

See *Wade* v. *Birmingham*, post, APPENDIX, PRACTICE, H.

And see 19 Ass. pl. 14.; Co. Litt. 16 b.; 1 Tho. Co. Litt. 250.; 7 Co. Rep. 15.; 9 Co. Rep. 31 a, 49 a.; Sir Richard Verney's case, Skinner, 432. The King and the Earl of Banbury, Skinner, 517.

PRACTICE.

E. NOTICES.

E. (c) *Effect of notice to produce papers.*

After a notice to produce a lease and a nonsuit on the trial of the cause, the defendant assigns the lease without the privity of his attorney on record. A second action is afterwards brought, and another notice to produce the lease is served upon the attorney, who informs the person serving the notice that the lease had been assigned, and that the assignment was made without his privity. The plaintiff being acquainted with the place of the defendant's residence: held, that it was incumbent upon him to have inquired of the defendant, in whose possession the lease was, in order to render secondary evidence of its contents admissible. *Knight* v. *Martin*, 1 Gow, 103. Dallas, C. J. 1819.

Semble, that where the plaintiff serves the defendant with notice to produce an instrument in his possession under which both parties claim the same interest, it is not necessary for the plaintiff to prove the execution of the instrument by the testimony of the subscribing witness: *aliter*, where their interests are adverse. *Knight* v. *Martin*, 1 Gow, 26. Dallas, C. J. 1818.

And see ante, PRACTICE, pl. 44, 45. *Pearce* v. *Hooper*, 3 Taunt. 60.

H. PUTTING OFF TRIAL.

In *Iremonger* v. *Hunt*, coram Wood, B. Winchester Lent Assizes, 1810, the defendant moved to put off the trial on an affidavit made by himself, stating, that the action was brought for a trespass, in sporting over land *in the possession of the plaintiff*, that the defendant had a clear right of sporting there, that A. B., a material witness to establish such right, was unavoidably absent, having been subpœnaed to attend the trial of the defendant and others, for a conspiracy at the York As-

sizes, and that the defendant had pleaded the general issue only. The application was refused, on the ground that the evidence of A. B. could not be material on the issue joined, and that the necessity of attending at York, where the business would not commence till Monday, the 13th, the commission day being on Saturday, the 11th, was not a sufficient excuse for the absence of a witness from Winchester, where the commission day was the 28th February.

If a plaintiff means to use a counter affidavit, he must produce it before he shews cause. *Ibid.*

To an action brought by the executors of the recoveree of an Irish judgment, the defendant pleaded in abatement. "And Edward Birmingham, Lord Birmingham, Baron of Athenry, in Ireland, against whom the plaintiffs have issued their original writ by the name and addition of E. B. Esq., in his own proper person, comes and says, that the said baron sued as aforesaid, before and at the time of the issuing out of this original writ in this cause was and still is Baron of Athenry, in Ireland aforesaid. And this the said baron sued as aforesaid is ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c."

Replication. *Cassari non.* "Because they say that the said defendant, at the time of the issuing out of the said original writ was not Baron of Athenry, as the said defendant has above in his said plea alleged. And this the said plaintiffs pray may be inquired of by the country, &c."

The paper book was delivered on 5th Feb. 1820, with notice of trial at the K. B. Sittings at Westminster after Hilary Term. On the 9th, Chitty obtained a rule to shew cause why the trial should not be postponed till the sittings after Easter Term. This was moved for on an affidavit made by the defendant and his attorney, H. Setree. The defendant states, that in order to establish his defence, it will, as he is advised, &c. and verily believes, be necessary to bring witnesses from Ireland, and obtain much evidence from public records, parish registers, and other documents there, without which he is advised, &c. that he cannot safely proceed to the trial of this cause, especially as this deponent is advised, &c. that he cannot safely proceed to trial without the testimony of Sir William Betham, Knt., Ulster King at Arms, and principal Herald of all Ireland, and Deputy Keeper of the Records in Birmingham towr, who is now in Ireland, and cannot, as this deponent verily believes, consistently with his the said Sir W. B.'s official duties, at this time come to England, nor can this deponent safely proceed to trial without the production by the said Sir W. B., of certain national records, kept in the said Birmingham towr, in the castle of Dublin, which records will not, as this deponent is informed and believes, be intrusted to the care of any other person than the said Sir W. B. That he purposes to leave London to-morrow, and to proceed forthwith to Ireland, for the purpose of collecting the needful evidence in support of his defence, but that it will not be possible to be prepared for trial at the time for which notice of trial has been given. That he expects, &c. he shall be able to obtain the attendance of the said Sir W. B. and the production of the said documents and other necessary evidence for the trial of this cause for the sittings after next Easter Term." The deposition of Setree merely stated, the delivery of the paper book with notice of trial.

On the last day of term, cause was shewn against the rule by Manning, who urged, that the defendant, after suffering a judgment to pass against him in Ireland, by the name of E. B., Esq. had no right to require that the executors of his creditors should try a question of peerage, and that a party who puts in a plea in abatement should be prepared to establish such plea, and not occasion further delay by such an application as the present. He stated that he had other objections to make, but was stopped by the court, who, asked Chitty whether his affidavit stated that the peerage had devolved on the defendant subsequently to the judgment obtained in Ireland. He admitted that this was not sworn, but stated from his own knowledge that the fact was so, and that, from the form of the judgment, it appeared to be on a warrant of attorney.

The court then desired Chitty to direct his argument to the increased delay. On this point he contended that an application to put off a trial on account of the absence of a material witness was a matter of course. The court, however, said, that although there might be cases in which it would be reasonable to postpone the trial of a plea in abatement, yet that in general, where a party puts on the record a plea unconnected with the merits, he ought to be prepared with evidence to support it, and that the indulgence now prayed would be contrary to the spirit of the act of parliament respecting dilatory pleadings; and discharged the rule without costs.

K. Nonsuit.

But in another case (see ante, Practice, pl. 73.) the court refused to notice, at nisi prius, an objection to an indictment appearing on the record. *Rex* v. *Souter*, 2 Stark. 423. Abbott, C. J. 1818.

In *Atkins and others, assignees of Tredgold*, v. *Seward and others*, notice was given to dispute the trading, the act of bankruptcy, and the petitioning creditor's debt. At the trial before Holroyd, J. at the Winchester Spring Assizes, 1819, the trading and act of bankruptcy were admitted; the act of bankruptcy was contested, and upon an objection to the sufficiency of the evidence on the ground that it appeared doubtful whether the trader was avoiding civil or criminal process, the learned judge ruled that there was evidence of an act of bankruptcy *to go to the jury*. The plaintiffs were ultimately non-suited on the merits. The plaintiffs afterwards applied to the learned judge at chambers, to certify that the trading act of bankruptcy and petitioning creditor's debt were proved or admitted at the trial. His lordship being attended by Lawes for the plaintiffs and Manning for the defendants, the latter urged that it could not be said, that an act of bankruptcy had been proved as it had been ruled, not that the evidence was sufficient to establish the fact, but that there was something upon which the jury might exercise their discretion. He also objected that the statute speaks only of *verdicts* on the one side or the other, and that, consequently, here a judge has no power to certify. As to the last objection, the learned judge said *valeat quantum;* and, having taken time to consider the first point and refer to his notes, his lordship granted a certificate; upon the taxation of costs, the defendants' agent stated the second objection which had been taken, and the prothonotaries disallowed the costs of the proof. In the ensuing term, the court of C. P. refused to grant a rule for reviewing the taxation. See 1 B. & B. 275.

M. Trial.

M. (d) *Jury.*

An information had been filed against Goodman and another, for importing foreign plate glass, without paying the duties. The cause was called on for trial at the sittings after Hilary Term, 1820, before the chief baron and a special jury, but went off for default of jurors. In Easter Term, *Walton* moved to set aside the jury and strike another upon the following affidavit:—"J. O. B. an officer in the service of the customs in the port of London, maketh oath and saith, that he has examined, in the Exchequer Office, in the Temple, the panel of the jury named in the above cause, and that he this deponent, the latter end of March last, and on the beginning of this present month, (April), made inquiries at the *stated* residences of the persons named in the said panel as to the probability of their attendance upon the trial of this information at the sittings after the present Easter Term. And this deponent further saith, that he was informed, and verily believes, that T. R., W. S., J. B., W. D., W. B., and M. W., being six of the said jurors, *do* (a) not reside at the respective places of residence set forth in the same panel, and *are* not to be found, except M. W., who has removed to Bristol. That R. M., one of the said jurors, *is* in Scotland, in consequence of

(a) Statutum est de cetero quod—*tempore summonitionis* infirmi vel in patrià non commorantes non ponantur in juratis vel minoribus assisis. Westminster, 2 (13 Edw. I.) cap. 38. And see Bro. Abr. Jurors, pl. 49; F. N. B. 165. D; Ibid. 166. D.

ill health, and his return to England uncertain. That J. E. has been confined to his house the last twelve months by ill health; and his son stated, that one of the barons of this honourable court had dispensed with his attendance as a juryman. That J. C., one of the said jurors, stated himself to be exempt (a), being an Accountant-general in the Court of Chancery. That W. F. and T. D. two of the said jurors, *stated that they should not be in London in May next.* That J. R. and G. R., two of the said jurors, *stated it was uncertain whether they should be* in London in May next. That S. F. and W. T., two of the said jurors, reside as stated in the panel, but are generally in the country, out of the county of Middlesex."

Walton said, he was aware that a similar application had been refused in *The King* v. *Perry*, 5 T. R. 453, but, in that case, there was an affidavit that the jurors were all alive and resident in the county.—Rule Nisi.

On a subsequent day, *Hill* shewed cause:

The affidavit in *The King* v. *Perry* was not at all relied upon, nor could it be, for that case was decided upon the authority of *The King* v. *Franklin*, in which it was held, by the Attorney-general himself, that the crown is not within the 7 & 8 W. 3. c. 32., therefore, that it could only have a *venire de novo* where one lay at common law, which, before verdict, was only for some defect in the original *venire*, or in the return to it; and it is not sworn that any of the jurors were non-resident at the time the jury was struck.

The proper remedy in this case is challenge, if any parties attend who are not qualified; and to answer challenges twenty-four jurors are returned where twelve only are required;—add to which talesmen are always at hand to supply deficiencies. In the present case there is no ground for the application even upon the crown's own shewing; for, subtracting the six who have changed their places of residence, the two who are ill, and the one who is exempt, still there is a sufficient number remaining to form a complete jury; for, with respect to the six who say they shall voluntarily absent themselves, it is not to be endured that anticipated disobedience to a rule of court and the king's writ is to be given as a reason why this court should change its course of proceeding. Upon this point, the question seems to be, whether these gentlemen shall obey the court or the court obey them; and who can say that if the court should order another jury to be struck, that it will be more convenient for other persons to attend than for these. If the private convenience of jurymen is to be made a ground for applications to the court, it might and would have little else to do than to attend to them.

If this application is made in the fear of the non-attendance of jurors, the court will remember that parties have a much better opportunity of inforcing the attendance of jurors after a postponement for default of jurors than at any other time, because they may move to estreat their fines, which would ensure a punctual attendance when the case came on again.

Enquiries like those of the deponent ought to be discouraged, because they tend to bias the minds of the jurors in favour of that party which appears willing to dispense with their attendance, and against that party which feels it necessary to compel them to do their duty.

Walton, in support of the rule.

It was shewn by the affidavit in support of the rule, that it was next to impossible a jury could be obtained upon the present venire; and he was not aware that the 7 & 8 W. 3. could be used to place the crown in a worse situation than a subject would be under similar circumstances. Such an application of that statute would, in fact, have a tendency to defeat the ends of justice. It had been said, on the other side, that if jurors did not obey the summons of the court, their fines might be estreated; but how was that possible in the present case, when it was distinctly shewn that some of the persons named in the panel did not reside at

(a) Qy. Whether an office exercisable in the county of Middlesex be an excuse for not serving on a jury; since the distringas does not, as in country causes, render it even possible that the trial should take place out of the county. See F. N. B. 147. A.

the places stated;—if then they could not be found for the purpose of summons, how could they be got at for the purpose of fining them for a disobedience to the summons. They were, in short, nonentities. The names appeared in the panel, but there were no persons answering to those names; and how could the crown, consistently with a due regard to the ends of justice, be precluded from the usual remedy, in all cases under such circumstances, between subject and subject.

Richards, C. B. It is clear that a sufficient number of jurors cannot be brought into court upon this venire, out of which to form a jury for the trial of this issue. The law requires that twenty-four should present themselves, to allow for objections which may arise at the time to individual jurors, and the affidavit sets forth that there are only fifteen persons on the panel who could present themselves, some of whom will be in another part of the country at the time. *Attorney General* v. *Goodman and another*, Exchequer, E. T. 1820.

M. (e) *Verdict.*

(And see post, N.)

Where the declaration contained thirty counts on fifteen bills of exchange, the court refused to compel the plaintiff to select the counts on which to take his verdict. *Ferguson and others* v. *Clarke*, 2 Stark. 44. Best, J. 1818.

The court will reject illegal evidence, although both parties agree to admit it. *Shaw* v. *Roberts and others*, 2 Stark. 455. Abbott, C. J. 1818.

M. (*f*) *Counsel.*

Upon the trial of A. B. and C. for a conspiracy, where, after the case on the part of the prosecution is closed; C. only calls witnesses and examines as to conversation between himself and A. The counsel for the crown may cross-examine such witnesses as to any other conversation between A. and C. though the evidence chiefly affect A. *Rex* v. *Kroehl and others*, 2 Stark. 343. Abbot, J. 1818.

N? New trial.

(a) *For defects apparent on the record.*

Where, on account of a defective finding, a venire facias de novo is awarded, whether the new jury are to inquire all de novo, or merely the point which was omitted, is made a query by the reporter in M. 18. E. 3 fo. 50. pl. 56. But the counsel who prayed the venire de novo appear to have considered it as restricted to the point omitted. This query has been magnified into "semble that they must inquire all de novo," 2 Roll. Abr. 721; 21 Vin. Abr. 468. But in M. 9. H. 4. fo. 7. pl. 20. it was said by Gascoigne, C.J. that "if an inquest be good in part and in other part not, it shall be inquired de novo as to the part which was badly found; and as to the part which was good it shall stand." Quod affirmatur per totam curiam, S. C. cited Fitz. Enquest, pl. 33; Bro. Enquest, pl. 98; Bro. Verdict, pl. 89. Two subsequent cases, however, seem to be at variance with this decision. In ejectment against husband and wife, the jury found the wife not guilty, and as to the husband, returned an insufficient special verdict, upon which a venire de novo was awarded. The second jury found both defendants guilty. And it was held that the second verdict should stand; for the record and issue being entire, the first verdict was insufficient in all and void. *Langley* v. *Payne*, Cro. Jac. 627. 2 Roll. Abr. 469, pl. 18. In the report in Rolle, it is stated, that "the clerks said that it was their course to grant the venire facias for the *whole*." And in Lord Sheffield's case in the Exchequer, 2 Roll. Abr. 469. pl. 19. it was held, that "where there are several issues joined, and the jury find any of them well and directly, and as to the others, find a special verdict, which is imperfect, a venire facias de novo shall be granted for the whole, and the jury, upon this, may find contrary to their first finding."

O. Affidavits.

And see table of contents and index, tit. Affidavit.

N. On the last day of Trinity Term, 1819, the court of K. B., on the motion

of Manning, referred an affidavit to the master for scandal and impertinence, in which the deponent had unnecessarily set forth a letter from himself, charging an attorney of the court with misconduct, in coarse, offensive, and general terms; and the deponent having abandoned a rule obtained on this affidavit, calling on the attorney to pay over a large sum of money, the court granted a rule absolute in the first instance.

Court allowed a rule to stand over after cause shewn to give an opportunity of making an affidavit, that application was made on behalf of bail. The affidavit to stay proceedings was made by one of the bail. *Newman* v. *Priddle*, K. B., 6th February, 1818.

SHERIFF.

C. Liability.

C. (a) *To the creditor.*

In an action against a sheriff for a false return of *nulla bona*, it is sufficient for him to shew that before execution executed a writ of error was allowed, although the levy was made before notice of the allowance, since the writ of error operated as a *supersedeas* from the time of its allowance. And notwithstanding the levy was made before notice of the allowance, yet the return of *nulla bona* is unobjectionable, since after the allowance the levy could not legally have been made. *Cleghorn* v. *Desanges and another*, 1 Gow, 66. Dallas, C. J. 1818.

SHIP.

A. Ownership.

(a) *How acquired.*

If B. sell a ship belonging to A. and promise to account to him for the proceeds, and pay the balance due, on the footing of the account to be rendered; A. may (notwithstanding the ship registry acts,) maintain an action founded on such promise, although B. is the sole registered owner of the ship. *Prouting* v. *Hamond*, 1 Gow, 41. Dallas, C. J. 1818.

G. Liability of owner.

(b) *For repairs, stores, &c.*

To charge the owners of a ship with money advanced to the captain in a foreign country, the plaintiff must shew that it was necessary to borrow the money, and must prove the actual application of it. *Bogle and another* v. *Atty*, 1 Gow, 50. Dallas, C. J. 1818.

K. Wages.

A purser's steward, on board one of his majesty's ships, cannot recover wages from the purser upon an implied contract, for his services as such on board the ship. *Carter* v. *Hall*, 2 Stark. 361. Ellenborough, C. J. 1818.

STAMPS.

B. Agreement.

After a contract for the sale of goods, a fresh agreement is made in writing, to cancel the former contract, and for the future delivery of the goods upon different terms. The second agreement relates exclusively to the sale of goods, and does not require an agreement stamp. *Whitworth* v. *Crockett and another*, 2 Stark. 431. Abbott, C. J. 1818.

D. Bills and notes.

An unstamped note may be shewn to the jury for the purpose of ascertaining a collateral fact. *Gregory* v. *Fraser*, 3 Campb. 454. Ellenborough, C. J. 1813. Acc. *Rex* v. *Inhab. of Pendleton*, 15 East, 449, 55.

E. Other instruments.

A policy containing a warranty to sail on or before a given day, may be altered, pending the risk, by a memorandum whereby the underwriters, in consideration of a further premium, agree to cancel the warranty, and to make a return of the additional premium if the ship sail with convoy. *Ridsdale and others* v. *Shedden*, 4 Campb. 107. Ellenborough, C. J. 1814.

An affidavit defective for want of a title may be intitled and re-sworn without a fresh stamp. *Prince and others* v. *Nicholson, executor*, C. P. M. T. 1813. MSS.

S. C. not S. P. 5 Taunt. 333; 665; and 1 Marshall, 70, 280, 401.

And see Anon, 3 Taunt. 469.

STATUTES.

B. Points on particular statutes.

B. (hh) 11 *Geo.* 2. *cap.* 19. *sect.* 3 & 4.

(Landlord and Tenant.)

The landlord may proceed by action or by complaint before a magistrate for the double value for aiding and assisting in the fraudulent removal of goods, at his option, although the sum claimed be less than 50*l.* *Horsefall* v. *Davy*, 1 Stark. 169. Gibbs, C. J. 1816.

And plaintiff may sue notwithstanding he may have first complained to a magistrate. *Ibid.*

And see ante, Action, pl. 87.

B. (ii) 15 *Geo.* 2, *cap.* 3. *sect.* 5.

(See ante, Bills and notes, pl. 1.)

B. (kk) 46 *Geo.* 3. *cap.* 135. *sect.* 1.

(Bankrupt.)

Trover by the assignee of a jeweller against a pawnbroker. Though it should be proved that the bankrupt had pledged gold seals, &c. with the defendant, after an act of bankruptcy, but more than two months before the commission issued, the jury are not bound to infer that the defendant had notice that the trader was insolvent or had stopped payment. *Smith and another, assignees of Tupman* v. *Dobree*, Dallas, C. J. Westminster, 20th May, 1820.

STOPPAGE IN TRANSITU.

C. At what period.

A. having entered goods in the books of the West India Dock Company, received two dock warrants or delivery orders in blank for them, which he delivered to B. on a sale of the goods to him, and B. having sold the goods to C. delivered the dock warrants to that person, and C. employed D. as his broker, to effect a sale of the goods, and delivered over the dock warrants, one of which was signed by C., but the blank intended for the name of the purchaser remained, and D., after having effected a sale on credit, delivered the dock warrants to the purchaser, one of which (viz. the one in which the blank for the name of the purchaser remained,) the purchaser deposited with E. as a security for money advanced on the faith of that warrant: held, that C. had no right to put a stop upon the goods in the event of the purchaser not paying for them, since the transfer of the warrant by D. his broker operated as a constructive delivery of the goods, so as to defeat C.'s right of stoppage *in transitu*. *Keyser* v. *Suse, Sibeth, Edward Man, and James Man, the younger*, 1 Gow, 58. Dallas, C. J. 1818.

TAXES.

Where a lessor covenants to allow land tax, the lessee can only deduct in

proportion to the rent, and not the whole that is imposed on the lessee; *comme semble. Whitfield* v. *Brandwood*, 1 Stark. 440. Abbott, C. J. 1818.

TENDER.

A. Form of Tender.

A tender of a bank-note in payment of a fractional sum is good, if the creditor object to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, although the creditor is required to return the difference between the bank-note and the fractional sum. *Saunders* v. *Graham*, 1 Gow, 111. Dallas, C. J. 1819.

TRESPASS.

C. To real property.

C. (a) *Where it lies.*

Action of trespass. Demise of a messuage with the appurtenances.—For several years, the door way of one of the rooms on the ground floor, formerly part of the house, had been bricked up. The walls of the room were wainscot only. The defendant had taken the brick work away and had fastened up the modern entrance. Scarlett insisted that as the room was within the external walls of the house, and had been formerly occupied with the house, and the lease had no exception, it passed as a part of the messuage. Abbott, C.J. said, it did not matter how it was separated from the house, the lease passed no more than the rooms usually occupied with the house, and that its being within the external walls was not material. *Karslake* v. *White*, Abbott, C. J. Sittings after Trinity Term, Middlesex, 1819.

Qu. Could burglary there be charged as committed in a part of the dwelling?

TROVER.

B. Conversion by defendant.

And see ante, Appendix, Statutes, B. (kk).

The hirer of goods, who sends them to an auctioneer to be sold, is guilty of a conversion; and so is the auctioneer, who refuses to deliver them up unless the expense incurred be first paid. *Loeschman* v. *Machin*, 2 Stark. 311. Abbott, J. 1818.

In trover for a landau, proof of a demand of the landau and non-delivery in pursuance of it, is evidence of a conversion. *Watkins, assignee of Moody, a bankrupt*, v. *Woolley*, 1 Gow, 69. Richardson, J. 1819.

"Trover will not lie where the party that hath the goods hath them by a delivery with a trust. As where I deliver my goods to a carrier to carry for me, and he doth keep, waste, *or dispose of them;* there not this action of the case, but another kind of action of the case lieth." Mich. 9 Jac. B. R. *Worme and Wall's case*, 1 Sheppard's Abr. 122.

This decision, which is reported in nearly the precise words used by the Lord Chief Justice when he directed the non-suit in *Devereux* v. *Barclay* (a) appears to have escaped the notice of subsequent writers, and was, unfortunately, not discovered till after the argument upon the motion for a new trial.

The proceedings in court in *Devereux* v. *Barclay*, have been shortly reported in 2 B. & A. 701 (b). The nonsuit had been directed upon the ground that the purchaser having delayed taking away the oil for several weeks after the stipulated time, the vendors must be considered as standing in the situation of warehousemen, and that the delivery of the oil to Dale by the defendants having been by mistake, such delivery was not evidence of a conversion.

The court afterwards set aside the nonsuit chiefly on the authority of

(a) Ante, 293, Trover, pl 19.

(b) From the report in 2 B. & A it might be inferred, that the second parcel of oil was sold as "*dark* Sperm oil." This was not the case, though the second parcel was, in fact, darker than the first

Youl v. *Harbottle* and *Samuel* v. *Darch*, ante, 293, Trover, pl. 18.

In these cases, a carrier, who had been intrusted with goods by A., afterwards, upon B.'s claiming such goods to belong to him, delivered them to B.; and it was held, that such delivery to B. was evidence of a conversion in an action brought by A.

Manning, in shewing cause, attempted to distinguish that case from the one before the court, in this respect, that in *Youl* v. *Harbottle*, the defendant had delivered the goods to B., upon a claim made by him, in opposition to the title of A. He had, therefore, taken upon himself to exercise a *jus disponendi* over the property, inconsistent with the title of A. He intended to deliver to B. and had made the delivery to B. not from any mistake, in supposing he had acted on behalf of A. He had merely mistaken the right of B. In that case, therefore, it was adjudged that a delivery to B., in opposition to the better title of A., was, as against A., a conversion, to which bona fides of the defendant's mistake as to the legality of B.'s claim furnished no answer. But in the principal case, the defendants never acted in opposition to Collinson's title, and never intended to deliver the goods to any other person; and the delivery, which was set up as a conversion, as against Collinson, was intended by the defendant to be a delivery to him, and an adoption of his title; for the delivery had been made under the idea that Dale; the person to whom it was made, was Collinson's servant, he being, in truth, the servant of Sturge, to whom Collinson had sold the second parcel of oil (a). It was ignorantia facti, not merely ignorantia juris; there was, therefore, no *jus disponendi* ever intended to be exercised, but throughout the defendant had adopted the title of Collinson, and intended to act in furtherance of it. The delivery to Dale was a mistake as to Dale's employer, occasioned by the negligence of Collinson and the plaintiffs, in not giving notice to the defendants of the different sub-sales; until receiving which, it is clear the defendants were justified in treating Collinson as the owner. *Townsend* v. *Inglis*, ante, 310. There was, therefore, here not even an innocent assumption of a power of disposing of the properties. See 2 Bulstr. 312; *Drake* v. *Shorter*, ante, 294. A distinction similar to the above is taken by the canonists. *Pothier, Traité du Contrat de Mariage*, num. 309, 310; 1 Phillimore's Reports, 132, *Wilson* v. *Brockley*. If the acceptor of a bill not payable to bearer, pay the amount to a person who falsely pretends to be the owner or the owner's agent, the payment will not discharge the acceptor from his liability to the true proprietor of the bill, although the strongest grounds may have existed for giving credence to the assertion. But where the bailee of a specific chattel, acting bonâ fide, delivers it to a person, whom, upon apparently good grounds, he believes to be the agent of that party who is in truth, the owner, the bailee is discharged (b).

(a) See the last note.

(b) The engagement which the drawer has contracted with the holder, and to which the acceptor has acceded, is not debitum certi corporis, but is debitum generis seu quantitatis, viz. of a certain sum expressed in the bill which the drawer has undertaken shall be paid at the place on which the bill is drawn. But there is a great difference between *debita certi corporis* and *debita generis seu quantitatis*. In *debita certi corporis* the thing due is at risk of the creditor, and the debtor is discharged, when, without any fault on his part, it has ceased to be in his possession. From which it follows, that if a *debitor certi corporis* delivers the thing due to one whom he has reason to think authorized by the creditor to receive it, though the fact turns out to be otherwise, such delivery is good, and he is discharged, for, thereby, without any fault on his part, he has ceased to be possessed of the thing due. For example, you sell me your horse, and I send Peter with a note, by which I request you to deliver the horse to Peter, the bearer of the note. The note is stolen, and the thief presents himself to you, pretending that he is Peter, and you deliver the horse to him, you are, undoubtedly, discharged from your obligation to deliver the horse to me, because this duty is a *debitum certi corporis*, which you have paid in good faith to one whom you had reason to believe to be authorized by me to receive it. It is not the same with respect to *debita generis*, as of a sum of money. With regard to these it cannot be said that the thing due is at the risk of the creditor, inasmuch as it cannot precisely be determined what is the thing due. For this reason, though the debtor of a sum of money should lose by an irresistible force the coin that he had destined for the payment of this sum, he is not discharged from the debt.

For the same reason, payment to a person whom the debtor, bonâ fide, and without any

Manning also urged that as the oil had neither been delivered nor paid for, both of which he contended were necessary to pass the property, the plaintiffs were not in a condition to sue as owners. It was true that in many of the late cases it had been assumed that, where the statute of frauds did not interfere, the property passed by the bargain and sale; but these were cases in most of which the questions of property did not fairly arise, the real question being, *at whose risk* the property stood; the answer to which depends upon very different principles. "It is an established principle," says Pothier (a), "that as soon as the contract of sale is complete, the thing sold is at the risk of the purchaser, even before delivery, so that if during this interval, it perishes without the fault of the vendor, the vendor is discharged, whilst the purchaser is nevertheless still bound to pay the stipulated price. The discharge of the vendor, under these circumstances, from his obligation to deliver, depends upon another principle, namely, that every obligation *certi corporis* is discharged, when the thing itself ceases to exist. This principle arises from the nature of the contract itself. The thing to be delivered being the subject of the obligation, it is obvious that when the former cases do exist, the obligation itself must be at an end (b)."

The rules of the civil law are quite clear on these points (c), and are not to be considered as positive regulations, but as necessary deductions from the nature of the contract *emptio-venditio*, and, therefore, co-extensive in their obligation with civil society itself. "If the vendor is fully competent to dispose of the thing sold, whether as principal or as agent, the effect of delivery is to pass the property in the thing sold to the purchaser, provided the purchase money is paid, or the vendor chooses to give credit. "The contract of sale cannot of itself produce this effect. Contracts can form only personal engagements between the contractors. A *delivery*, made in pursuance of the contract can alone transfer the property. It follows, that if the proprietor, after selling an article to A., without delivering it, should be so dishonest as to sell and deliver it to B., a subsequent bonâ fide purchaser, the property would be transferred to B. A. would only have a personal action against the vendor for his damages and loss resulting from the non-execution of the contract, and has no right in the property, as against B. He has neither jus ad rem nor jus in re. Another consequence of this principle is, that the creditors of the vendor may, before delivery, seize the property even where the price has been paid, and the purchaser, in this case, has only an action against his vendor (d)."

negligence on his part, believes to be authorized by the creditor to receive the amount, will not discharge the debtor where no such authority was in fact given, unless the error was occasioned by the act of the creditor himself."

Pothier, Traité du Contrat de Change, num. 168.

And see the same distinction ably explained, Scaccia de Commerciis, 384, pl. 340, &c. edit. 1620.

(a) C'est un principe établi au titre du Digeste de periculo et commodo rei venditæ, qu'aussi-tôt que le contrat de vente est parfait la chose vendue devient aux risques de l'acheteur, quoiqu'elle ne lui ait pas encore été livrée; de manière que si pendant ce temps elle vient à périr sans la faute du vendeur le vendeur dévient quitte de son obligation et l'acheteur n'est pas pour cela quitte de la sienne, & n'est pas moins obligé de payer le prix convenu.

Que le vendeur soit quitte de son obligation, lorsque la chose vendue est périe sans sa faute, c'est une conséquence d'un autre principe, que toute obligation d'un corps certain s'éteint lorsque la chose cesse d'exister; Traité des Obligations, part. 3, chap. 6. Ce principe est pris dans la nature même des choses; car la chose due étant le sujet de l'obligation, il s'ensuit que lorsqu'elle cesse d'être l'obligation ne peut plus subsister, ne pouvant pas subsister sans sujet. Pothier, Traité du Contrat de Vente, num. 307. And see I. 3. 24. 3.; D. 18. 6. 8.

(b) Quamvis enim alioquin verum sit venditorem hactenus teneri ut rem emptori habere liceat, non etiam ut ejus faciat. D. 19. 1. 30. 1.

Qui vendidit necesse non habet fundum emptoris facere; ut cogitur qui fundum stipulanti spospondit. D. 18. 1. 25. 1.

(c) Quod vendidi non aliter fit ACCIPIENTIS quam si aut pretium nobis solutum est, aut satis eo nomine factum; vel etiam fidem habuerimus emptori sine ullâ satisfactione. D. 18. 1. 19. And see the last note.

(d) Lorsque le vendeur est propriétaire de la chose vendue, & capable de l'aliéner; ou s'il ne l'est pas, lorsqu'il a le consentement du propriétaire, l'effet de la tradition est de faire passer en la personne de l'acheteur la propriété de la chose vendue, pourvu que l'acheteur en ait payé le prix, ou que le vendeur ait suivi sa foi.

Le contrat de vente ne peut pas produire par lui-même cet effet. Les contrats ne peuvent

The common law adopted the principle of the civil law on this subject. Thus in an action for breaking close and taking wheat which defendant had bought but not paid for, the question was, whether in the defendant's plea stating the purchase, he ought to have averred payment. BRYAN said, that it was necessary; because, though the property passed by the bargain, a special property remained in the vendor like that of lessor of sheep. LITTLETON,—"I can never admit that the property is in him who purchases verbally without payment. For it is not an absolute bargain, but upon a condition in law, namely, that if he pays, it shall be good; if not, it shall be void (e)."

The modern rule that the property passes by the bargain without either payment or delivery, appears to be an anomaly arising not from the deliberate adoption of a new standard of decision, whether good or bad, but from an unintentional misapplication of an admitted principle.

USE AND OCCUPATION.

B. NATURE OF OCCUPATION.

A. having contracted for the lease of a house, permits his mistress to occupy it. It is afterwards agreed that she shall take up the bills which he has accepted in part payment of the purchase money, and that the lease shall be assigned to her, she remains in possession and does not take up the bills, and marries the defendant who occupies the house, A. cannot, in the absence of any communication respecting rent, recover for use and occupation. *Keating* v. *Bulkely*, 2 Stark. 419. Abbott, C. J. 1818.

VARIANCE.

A. WHAT SHALL BE MATTER OF ALLEGATION, AND WHAT MATTER OF DESCRIPTION.

The maker of a promissory note, by a memorandum at the foot makes it payable at a particular place, an allegation, (after stating the promise to pay in the usual manner) that the defendant then and there made the note payable at the particular place, does not amount to a misdescription of the note. *Hardy* v. *Woodroofe*, 2 Stark. 319. Abbott, J. 1818.

And see ante, BILLS AND NOTES, D. (b); ibid, pl. 160, 167, 168, 169, 170, 171; *Butterworth* v. *Lord Le Despencer*, 3 M. & S. 150.

A trader, in a commission of bankruptcy issued against him, is described as a money scrivener only. It is nevertheless competent to a plaintiff to support the commission by proof of any species of trading, notwithstanding the omission of the general words dealer and chapman. *Smith* v. *Sandilands*, Holroyd, J. Gloucester Summer Assizes, 1819. 1 Gow, .

The same point was ruled by Wood, B. in Winchester Spring Assizes, 1820.

B. MATTER OF ALLEGATION, WHERE SUFFICIENTLY PROVED.

An allegation in a declaration that a bill of exchange was presented for payment by I. S. does not render it incum-

que former des engagemens personnels entre les contractans : ce n'est que la tradition faite en conséquence du contrat, qui peut transférer la propriété de la chose qui a fait l'objet du contrat, suivant cette règle : Traditionibus non nudis conventionibus, dominia transferuntur, L. 20, Cod de pact.

De là il suit que si le propriétaire d'une chose, après l'avoir vendue à un premier acheteur sans la lui livrer, avoit la mauvaise foi de la vendre & livrer à un second, ce seroit à ce second acheteur que la propriété seroit transférée; L quoties 16, Cod de rei vindic. Le premier n'auroit qu'une action personnelle contre le vendeur pour ses dommages & intérêts résultans de l'inexécution du contrat; & il ne pourroit la repéter contre le second acheteur qui l'auroit achetée de bonne foi, inscius prioris venditionis.

De là il suit pareillement que les créanciers du vendeur peuvent saisir la chose que leur débiteur a vendue, avant qu'il l'ait livrée, quand même l'acheteur en auroit payé le prix; l'acheteur, en ce cas, n'a qu'une action contre son vendeur, & n'a aucun privilege sur cette chose. Contrat de Vente, No. 318-19-20.

(e) P. 17. E. 4. fo. 1 & 2, pl. 2; S. C. cited and S. P. Plowden, 11, b.

bent on the plaintiff to shew that a presentment by I. S. was made. The material allegation is the presentment; and *by whom* it was made is immaterial. *Boehm* v. *Campbell*, 1 Gow, 55. Dallas, C. J. 1818.

And see ante, ABATEMENT, pl. 7.; BILLS AND NOTES, pl. 320.; ESCAPE, pl. 2, 3.; FELONY, pl. 15.; GAMING, pl. 18.; PENAL ACTION, pl. 47.; VARIANCE, pl. 52.; Doctrina Plac. 163.; *Rouse* v. *Bardin*, 1 H. Bla. 351. *Gadd* v. *Bennett*, 5 Price, 540.

An allegation in pleadings between A. and B., that C. became bankrupt, is not proved by an act of bankruptcy committed under circumstances in which a commission *might* have issued. *Bulkeley* v. *Lord*, 2 Stark. 406. Abbott, J. 1818.

And the court refused a rule to set aside nonsuit. *Ibid.*

Indictment against the receiving-clerk of one *Orme*, a distiller, charged that the prisoner received a 50l. bank note and 14*s.* 10*d.* in moneys, and embezzled the 14*s.* 10*d.* A publican swore that he paid the prisoner 50*l.* 14*s.* 10*d.*, but said he did not know how he paid it. It might be all in notes or by a draft. The learned judge held, that it ought to have been proved that the prisoner received 14*s.* 10*d.* in moneys numbered; and directed an acquittal. *Rex* v. *Hes.* Bayley, J. Surrey Spring Assizes, 1816.

And see ante, TENDER, pl. 7, 8, 9.

C. MATTER OF DESCRIPTION, WHERE SUFFICIENTLY PROVED.

In assumpsit against a carrier for the loss of goods, to be carried from A. to B. a variance as to the termini is fatal. *Tucker* v. *Cracklin*, 2 Stark. 385. Abbott, C. J. 1818.

VENDOR AND PURCHASER.

A. SALE.

A. (c) *Contract, when perfect.*

Where the vendor attempts to stop in transitu, and the vendee recovers in an action against the carrier, the purchaser cannot afterwards dispute the delivery of the goods. *Groning* v. *Mendham*, 1 Stark. 299. Ellenborough, C. J. 1818.

And the court refused a rule for a new trial. *Ibid.*

H. sells wool to J. for bill at nine months. The wool is weighed. No bill is drawn by H. Samples are taken and several bags are delivered to subpurchasers. J. re-sells the residue to G., but becomes insolvent before the wool is delivered from H.'s warehouse. Held, that the contract is executed, and the property is vested in G., against whom H. has no lien for the price. *Green* v. *Haythorne*, 1 Stark. 447. Ellenborough, C. J. 1816.

Upon a motion for a new trial, the court seemed at first to be inclined to give an opportunity for a further consideration of the question, but ultimately refused the rule on the ground that the letter containing the order, for the delivery of the goods had been transmitted by G. in London, on the 16th, to H. at Bristol, and that H. had not signified his dissent until after the insolvency of J., which took place on the 21st.

And see ante, TROVER, APPENDIX.

Where a verbal contract for the sale of goods is afterwards put into writing by the vendor's agent, for the purpose of assisting his recollection, but the memorandum is not signed by the vendee, it need not be produced. *Dalison* v. *Stark*, 4 Esp. 163. Ellenborough, C. J. 1812.

A. (d) *Concealment.*

A purchaser cannot refuse to perform an agreement for "the unexpired term of eight year's lease and goodwill" on the ground that only seven years and seven months of the term remained. *Belworth* v. *Hassell*, 4 Campb. 140. Ellenborough, C. J. 1815.

But see ante, BILLS AND NOTES, pl. 124.

Where the seller produces a sample, and represents that the bulk is of equal quality, but the sale-note does not refer to the sample, and if the goods turn out to be of inferior quality, the remedy is an action for deceit. *Meyer* v. *Everth*

and another, 4 Campb. 55. Ellenborough, C. J. 1814.

In cases of a fraudulent misrepresentation or concealment, the vendee may, notwithstanding such a clause, vacate the contract. *Schneider and another* v. *Heath*, 3 Campb. 506. Ellenborough, C. J. 1814.

N. *Illud nullâ pactione effici potest, ne dolus præstetur*, *Dig*. 5. 14. 17. 3.

Where a lease containing the usual covenant to repair, is sold by auction, if any of the demised buildings have been pulled down before the sale, the vendee is not bound to complete the purchase, and may recover back his deposit, although the building pulled down be not described in the particulars of sale. *Granger* v. *Worms*, 4 Campb. 83. Ellenborough, C. J. 1814.

B. Delivery, what shall be.

The civil law, which applies the same rule to bulky articles in general, *Dig*. 18, 6, 14, 1, makes a distinction with respect to cases in which the marking is not necessarily the last act on the part of the seller; "*Si dolium signatum sit ab emptore, Trebatius ait, traditum id videri: Labeo, contra; quod et verum est; magis enim ne summutetur signari solere, quam ut tradere tum videatur.*"—*Dig*. 18, 6, 1, 2.

And see an opinion by Plowden on an anonymous case mentioned in Moore, 260; *Pothier, Traité du Contrat de Vente, part*. 5. *chap*. 1. *num*. 315.

E. Rights of vendee.

A. undertakes to convey a new inclosure to B., he must convey the legal estate, and not merely substitute B.'s name for his own, for the purpose of receiving an assignment of the lands from the commissioners of inclosure. *Casse* v. *Baldwin and others, executors of Baldwin*, 1 Stark. 65. Ellenborough, C. J. 1815.

Upon the non-performance of conditions of sale on the part of the vendor, the purchaser is intitled to the whole sum paid to the auctioneer; as well the auction money as the deposit. *Ibid*.

G. Bill of sale.

G. (a) *Possession under.*

If an assignment be made of household furniture, and the assignor continue in the possession of it, it is not protected against an execution, at the suit of a creditor of the assignor, unless the assignment were notorious. In such cases, the notoriety of the change of possession is the question to be ascertained. *Armstrong and another* v. *Baldock, Esq.*, 1 Gow, 33. Dallas, C. J.

Where goods are sold by public auction, and the seller, after a *bonâ fide* sale, is allowed to continue in the possession of them, they cannot be taken in execution by one of the sellers' creditors who was present at the sale, since the transfer was open and notorious, and there was a good consideration to support it. *Ibid*.

WARRANTY.

A. Warranty of the quality of goods.

A. (a) *What shall amount to a warranty.*

A. exchanges a watch for goods, warranted silver. He cannot maintain trover for the watch upon a breach of the warranty. *Emanuel* v. *Dane*, 3 Campb. 299. Ellenborough, C. J. 1812.

S. P. *Power* v. *Wells*, Dougl. 24, n. and see *Cooke* v. *Munstone*, 1 N. R. 151.

Unless the exchange were fraudulent on the part of the defendant. *Ibid*.

And see *Lewis* v. *Cosgrave*, 2 Taunt. 2, 4; ante, Bills and notes, pl. 46, 53.

A. (b) *Warranty, where broken.*

Held that a warranty that goods should be dispatched before 31st July, from St. Petersburgh, is satisfied by sending them from St. Petersburgh and landing them at Cronstadt before that day, though they are not dispatched

from Cronstadt, the landing port of St. Petersburgh, till after the stipulated time. *Busk* v. *Spence*, 4 Campb. 329. Gibbs, C. J. 1815.

A. (c) *Remedy for breach.*

A. & B. severally employ C. to sell their horses, C. sells both to D. at an entire price, and warrants them sound. D. cannot sever the contract and bring an action on the warranty against A., in respect of the unsoundness of A.'s horse. His remedy is against C. alone. *Symonds* v. *Carr*, 1 Campb. 361. Ellenborough, C. J. 1808.

S. P. *Hort* v. *Dixon*, Selw. N. P. 101.

A. (d) *Damages how computed.*

In an action for breach of warranty, the plaintiff may recover the whole value he would have received had defendant performed his contract. *Bridge* v. *Wain*, 1 Stark. 504. Ellenborough, C. J. 1816.

And the court refused a rule for a new trial. *Ibid.*

The purchaser of an unsound horse cannot recover for his keep without proof of an offer to return him before action brought. *Caswell* v. *Coare*, 2 Campb. 82. Mansfield, C. J. 1809.

And the court reduced a verdict in which the keep had been included, 1 Taunt. 566.

And see ante, Vendor and purchaser, pl. 77, 78, 79, 80, 81.

Quas impensas necessario in curandum servum post litem contestatam emptor fecerit, imputabit; præcedentes impensas nominatim comprehendendas, Pedius; sed CIBARIA *servo data non esse imputanda, Aristo ait; nam nec ab ipso exigi,* QUOD IN MINISTERIO EJUS FUIT. *Dig.* 21, 1, 30, 1.

This reasoning seems to be applicable only to cases in which the failure of the warranty is attended with no immediate inconvenience to the purchaser; as where the slave *has been* diseased, or a thief, or a fugitive, or where the vendor has no title.

A soap boiler using barrilla warranted of a particular quality, in eight successive boilings without complaint must pay the full price. *Hopkins* v. *Appleby*, 1 Stark. 477. Ellenborough, C. J. 1816.

WITNESS.

B. Persons privileged from examination.

B. (d) *Attorney.*

An attorney called to prove a communication from his client respecting a dissolution of partnership was objected to upon the ground of professional confidence. The chief justice held, that no communication with an attorney by his client was protected, but what related to a cause either existing or about to be commenced; and cited a case in the Midland circuit. "An action for bribery, Mr. Serjeant Adair and Mr. Serjeant Wilson attended special, where an attorney was called to prove a communication from his client; the evidence was rejected, but a new trial was afterwards granted, it being held that no communication was protected but what related to a cause."

The attorney, in this case, was called to prove a communication with his client, who called upon him to advise respecting a dissolution of co-partnership, the object of the evidence being to prove the partnership. *Wadsworth* v. *Hamshaw*. Abbott, C. J. Guildhall, 1 March, 1819.

But, in a subsequent case, it seems to have been held that a communication made to a person employed merely as a scrivener or conveyancer is privileged, provided such person is also an attorney.

Trover against the sheriff of Hertfordshire for the seizure and sale of certain goods. The defendant had taken the goods under a fi. fa. against T. Cromack, the father of plaintiff. The question in the cause was, whether a bill of sale of those goods from T. Cromack to the plaintiff was fraudulent or not. Taddy, Serjeant, proposed to call Mr. Smith, an attorney, to prove these facts—that previous to the date of the bill of sale, Cromack, the father, had come to him and requested him to prepare a deed of conveyance of all his goods, stock in trade, &c. from him to his son, the plaintiff—that upon Mr. Smith's in-

quiring what was the consideration or sum to be paid by the son, Cromack replied, that there was none, but that he meant to make a gift of them to his son; that upon this, Mr. Smith, knowing that judgment had been recently obtained against the father, thought that the transaction was fraudulent, and refused to prepare the deed; and another attorney was then employed by Cromack. The learned judge was of opinion, that the communication to Mr. Smith was privileged, and refused to admit the evidence. *Cromack* v. *Heathcote*, Richards, C. B. Hertford Lent Assizes, 1820.

And the Court of C. P. held, that this decision was right, and refused a rule for a new trial, E. T. 1820.

C. Interest.

As to the competency of witnesses in actions against underwriters, see ante, Insurance, P. (b).

C. (b) *In questions of bankruptcy.*

In trespass against the assignees and messenger by the bankrupt, to try the validity of the commission, a creditor may be called by the plaintiff to disprove the trading. *Hale* v. *Small*, Wood, B. Winchester Spring Assizes, 1820.

C. (c) *Bills and notes, in cases upon.*

In an action against the acceptor of a bill of exchange accepted for the accommodation of the drawer, the latter is not a competent witness to prove that the holder discounted the bill on usurious terms. *Hardwick* v. *Blanchard*, 1 Gow, 113. Dallas, C. J. 1819.

C. (e) *In actions by or against executors.*

An executor sued for a debt alleged to be due from the testator, may call a person to disprove the debt, who takes no beneficial interest under the will, although, on the *voir dire*, he admits that he has instructed a proctor to take steps to impugn the will, and if the probate be revoked, he will be intitled as next of kin. *George and others* v. *Dobson and another*. Burrough, J. Salisbury Spring Assizes, 1820.

C. (i) *Partners.*

Where the non-joinder of B., as a co-defendant is pleaded, the plaintiff may call B. to disprove the joint liability. *Cossham* v. *Goldney and another*, 2 Stark. 414. Bayley, J. 1818.

C. (k) *Privies in estate.*

Action of trespass for breaking hatches and penstock. Justification, that the waterpenned back overflowed defendant's meadows; 2ndly. overflowed a public road. Plaintiff proved an enjoyment of the hatches in their present state for thirty years; trespass admitted; defendant contended plaintiff had no right to have the hatches either as against him or against the public road, and offered in evidence articles of agreement dated in 1745, between persons standing in the respective situations of plaintiff and defendant, reciting that the party under whom the plaintiff claimed had penned back the water higher than usual, by which the person holding the lands, now held by defendant, had been injured, and that to prevent all disputes in future, as well as to settle all damage hitherto done, the former agreed to allow the latter 12l. a year. To produce this deed the defendant's attorney was called, who said, he had received it from the son of the owner of the defendant's land. This was objected as insufficient; then the son of the owner was called, who said he had received it from his father that morning; this being also objected to, the father was called, upon which the plaintiff examined him upon the voir dire, and he said that he contended that the plaintiff had no right to the hatches, when the plaintiff objected that he could not be examined being interested. Whereupon Holroyd, J. held, that as the father was objected to, the next best evidence had been given, and admitted the deed. *Card* v. *Jeans*. Dorchester, 11th March, 1819.

C. (l) *Servants.*

A person who has bought goods in his own name is not a competent witness to prove that he purchased them as agent for the defendant. *M'Brain* v.

Fortune and another, 3 Campb. 317. Ellenborough, C. J. 1812.

N. It does not appear that any release was offered.

C. (o) *In other cases.*

Where a witness is called who has been previously (see ante, WITNESS, pl. 182.) examined, an objection prevails in the civil law, which, in our courts, goes only to his credit; *produci testis is non potest qui ante* IN EUM REUM *testimonium dixit;* Dig. 2, 5, 26. Which rule seems in some measure to have been adopted in *Dudds* v. *Billings*, Bunb. 24.

See Cod. 4. 20. 17; Nov. 90, cap. 4.

C. (q) *Objection, how repelled.*

A witness on examination on the voir dire, acknowledges that he has entered into a contract (the effect of which is to render him incompetent,) at the same time, he produces the written contract itself. This ought to be read. *Butler and another, assignees of Oakley* v. *Carver*, 2 Stark. 433. Abbott, C. J. 1818.

E. EXAMINATION OF WITNESSES.

E. (d) *Repudiation of evidence.*

Where, in an action against an acceptor, a witness called to prove an indorsement, denies that it is in the handwriting of the alleged indorser, the indorser himself may be called to prove it. *Richardson* v. *Allen*, 2 Stark. 334. Ellenborough, C. J. 1818.

In an action on an agreement to execute articles of partnership, the plaintiff called a witness who proved the breach of the agreement, by the admission of the defendant, who, in the same conversation, stated as his reason for refusing to perform the agreement, that the plaintiff was insolvent, and that he had delivered the partnership property (wine) in satisfaction of his separate debts. The defendant wished to rely upon the evidence so given by the plaintiff, but the chief justice, after argument by Marryat, ruled, that although the defendant had assigned his reasons for breaking the agreement at the same time that he had made the admission upon which the plaintiff relied, yet that it must not be taken that the reasons so assigned by the defendant were well founded; that the evidence went no further than that the defendant had so declared, but that if the defendant meant to rely upon the facts so stated by him as a defence, he must prove the truth of such facts by evidence, and was not entitled to have such facts taken as true, because he had stated them, although such statement had been made at the time of the admission upon which the plaintiff relied. Verdict for plaintiff. *Remmie* v. *Hall*, Abbott, C. J. Guildhall, 6th March, 1819.

BANKRUPT.

C. PETITIONING CREDITOR'S DEBT.

Where no notice has been given to dispute the petitioning creditor's debt, it must appear from the depositions that it existed at the period of the act of bankruptcy. *Clarke* v. *Askew*, 1 Stark. 458, *n.* Bayley, J. Durham, 1816.

And the court discharged a rule for a new trial. *Ibid.*

S. P. *Lawson* v. *Robinson*, 1 Stark. 456. Ellenborough, C. J. 1816.

EVIDENCE.

H. ADMISSIONS.

H. (a) *By the party:*

The evidence which a person has given before a committee of the House of Commons, is admissible against him on a criminal charge. *Rex* v. *Merceron*, 2 Stark. 366. Abbott, C. J. 1818.

PRACTICE.

In *Weeks* v. *Sparke*, Chambre, J. Devon Lent Assizes, 1813, one of the jury being taken unwell, was suffered to retire, the trial proceeded by consent, and a verdict was given by the remaining eleven.

That no attaint would lie on such verdict, see *Hassett* v. *Payne*, Cro. El. 256. And see *Hill* v. *Yates*, 12 East, 229; Clyncard's case, Cro. El. 654; *Jeffreys* v. *Tyndall*, Palm. 411; F. N. B. 1. n. (3).

NAMES OF CASES ANALYSED.

Case	Reporters.	Titles and Placita.	Page.
Aaron v Alexander	3 Campb. 35	Action, 51	6
		Costs, 6	104
		Trespass, 6	289
Abbott, Atkinson v	1 Campb. 535	Insurance, 9	165
Abel, Precious v	1 Esp. 351	Agent, 47	19
—— v Potts	3 Esp. 242	Insurance, 104, 205, 214, 220	180-1
		Evidence, 102	126
—— v Sutton	3 Esp. 108	Partners, 58	223
Abery, Sheldrick v	1 Esp. 55	Action, 66	7
Abingdon, Lord, Rex v	1 Esp. 226 and Peake, 237	Parliament, 9	219
		Practice. 78, 89, 100	245
		Costs, 3	104
		Statutes, 38	279
		Libel, 39	197
Abitbol v Beneditto	2 Campb. 487	Practice, 72	245
———, Sebag v	1 Stark. 79	Bills and notes, 153	82
Abrahams, Cowan v	1 Esp. 50	Evidence, 179	132
Abraham, Maseters v	1 Esp. 375	Evidence, 300	140
Abraham v Du Bois	4 Campb. 269	Bills and notes, 21	72
Abrahams, Biddle v	1 Stark. 305	Ejectment, 19	114
Acerro v Petroni	1 Stark. 100	Misnomer, 10	212
Ackerman, Brard v	5 Esp. 120	Witness, 32, 99	323-7
		Usury, 40	300
Ackland v Pearce	2 Campb. 599	Usury, 32	300
		Evidence, 154	130
Adams, Pinkerton v	2 Esp. 611	Witness, 59, 96	325-7
		Pleading, 35	236
		Assumpsit, 102	42
		Bills and notes, 92	77
——— v Davies	3 Esp. 48	Agent, 103	23
		Witness, 156-7	331
——— v Lingard	Peake, 117	Witness, 87	327
——— v Fairbairn	2 Stark. 277	Assumpsit, 25	35
		Vendor & purchaser 69, 70	314
——— v Malkin	3 Campb. 534	Bankrupt, 5	49
		Witness, 69	326
———, Noble v	Holt, 248	Stoppage in transitu, 18-9	283
		Vendor & purchaser, 42	311
Adamson, Stevens v	2 Stark. 422	Auction, Appendix	346

NAMES OF CASES ANALYSED.

NAMES OF CASES ANALYSED.

NAMES OF CASES ANALYSED.

B

NAMES OF CASES ANALYSED.

NAMES OF CASES ANALYSED.

B

NAMES OF CASES ANALYSED.

NAMES OF CASES ANALYSED.

NAMES OF CASES ANALYSED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

D.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

F f

E.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

G.

NAMES OF CASES ANALYZED.

H.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

I.

J.

NAMES OF CASES ANALYZED.

K.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

	Reporters.	Titles and Placita.	Page.
King, Watson *v*	4 Campb. 272	Evidence, 84	124
		Trover, 3	292
		Execution, 2	145
		Agent, 66	20
——, Wilkinson *v*	2 Campb. 335	Trover, 8, 9	292
Kingston, Harman *v*	3 Campb. 150	Insurance, 83	170
		Insurance, 1, 2	164
—— *v* Knibbs	1 Campb. 508, *n.*	Insurance, 126	174
—— *v* M'Intosh	1 Campb. 512	Insurance, 51	168
—— *v* ——	1 Campb. 518	Interest of money, 14	184
—— *v* Phelps	Peake. 227	Arbitrament, 7, 8	32
		Evidence, 241	136
Kington, Free v	MSS.	Tender, 24	286
Kinlock, Taylor *v*	1 Stark. 177	Bankrupt, 77-8	54
——, —— *v*	1 Stark. 175	Ship, 3	258
Kirk *v* French	1 Esp. 80	Action on the case, 37	11
		Variance, 31	303
Kirkman, Cranch *v*	Peake, 121	Limitation of actions, 4	262
Kirwan *v* Cockburn	5 Esp. 233	Set-off, 223	253
		Evidence, 70	124
Kist *v* Atkinson	2 Campb. 63	Action, 85	8
Kitchen, Sayer *v*	1 Esp. 209	Bills and notes, 112	79
		Evidence, 115	127
——, Sims *v*	5 Esp. 46	Practice, 40	243
Klinitz *v* Surry	5 Esp. 267	Frauds, statute, of, 11, 12.	152
Knapp *v* Salsbury	2 Campb. 500	Pleading, 51	237
Kneller, Phipson *v*	4 Campb. 285 & 1 Stark. 116	Bills and notes, 243	89
Knibbs *v* Hall	1 Esp. 84 & Peake, 210	Assumpsit, 98	41
		Distress, 7	112
		Set-off, 18, 21	253
——, Kingston *v*	1 Campb. 508, *n.*	Insurance, 126	174
Knight *v* Crockford	1 Esp. 189-92	Stamps, 14	272
		Frauds, statute of, 6	152
		Pleading, 7	235
——, Doe d. Quigley *v*	2 Campb. 505	Landlord and tenant, 40	191
——, Simmonds *v*	3 Campb. 251	Bankrupt, 104	56
Knouth, Probart *v*	2 Esp. 472, *n.*	Infancy, 4	158
Knowlys, Hammersley *v*	2 Esp. 666	Debtor and creditor, 10	109
Knox, Joseph *v*	3 Campb. 320	Carriers, 17, 38	100-1
—— —— *v*	3 Campb. 332	Ship, 109	266
—— Smith *v*	3 Esp. 46	Bills and notes, 141, 265, 86-7	81, 91-2
—— *v* Whalley	1 Esp. 159	Bills and notes, 77	76
		Estoppel, 3	118
—— *v* Wood	1 Campb. 543	Insurance, 28	166
Koopes *v* Chapman	Peake, 19	Witness, 50	324
——, Cheyne *v*	4 Esp. 112	Witness, 135	330
Kruger, Forsboom *v*	3 Campb. 197	Ship, 157	270
Kuhn *v* Weston	3 Esp. 54	Bills and notes, 194	85
Kymer, Bell *v*	3 Campb. 545	Ship, 57	263
——, Moorsom *v*	3 Campb. 549	Ship, 57	263
—— *v* Suwercropp	1 Campb. 109-30	Stoppage in transitu, 25	283
		Agent, 73	21

L.

NAMES OF CASES ANALYZED.

M.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

	Reporters.	Titles and Placita.	Page.
Manley *v* Peele	5 Esp. 121	Stamps, 53	275
Mann *v* Barrett	6 Esp. 32	Trespass, 3	289
—— *v* Forrester & another	4 Campb. 60	Insurance, 105-6	172
——, Spencer *v*	5 Esp. 110	Variance, 59, 60	305
		Penal action, 9, 10	227
Manners, Ainstey *v*	1 Gow, 10	Baron and feme, Appendix	347
——, Burbridge *v*	3 Campb. 193	Bills & notes, 103-4, 211.	78, 86
—— *v* Postan	4 Esp. 240	Usury, 34	300
		Witness, 282	340
Manning, Parker *v*	2 Esp. 598, *n.*	Bankrupt, 82	55
Manston, Clark *v*	5 Esp. 239	Variance, 76	306
Mant, Harman *v*	4 Campb. 161	Ship, 79	264
Manzelman, Bowman *v*	2 Campb. 315	Ship, 153	270
March *v* Ward	Peake, 130	Bills and notes, 10	72
Markham, Bunn *v*	Holt, 352	Donatio mortis causâ, 2, 3.	112
——, Shaw *v*	Peake, 165	Bills and notes, 186	85
Marlow, Murphy *v*	1 Campb. 57	Amendment, 1	29
Marlborough, Duke of, Johnson *v*	2 Stark. 313	Bills and notes, Appendix,	348
Marnel *v* Pickmore	2 Esp. 473	Infancy, 25	160
Marriott *v* Hampton	2 Esp. 546	Assumpsit, 100	41
Marryat, Goldschmidt *v*	1 Campb. 562	Practice, 39, 67	214-5
Maryatts *v* White	2 Stark. 101	Debtor and creditor, 9	109
Mars, Jones *v*	2 Campb. 305	Bills and notes, 16, 18	72
Marsden, Cooper *v*	1 Esp. 1	Evidence, 136-7	129
		Witness, 273-4	339
——, Hodgkinson *v*	2 Campb. 121	Bond, 9	98
		Foreign judgment, 2	160
Marsh *v* Collnett	2 Esp. 665	Evidence, 107	126
——, Fraser *v*	2 Stark. 41	Witness, 210	335
——, Frazer *v*	2 Campb. 517	Ship, 118-9	267
—— *v* Maxwell	2 Campb. 210, *n.*	Bills and notes, 202	86
—— *v* Meager	1 Stark. 353	Bankrupt, 195	64
—— *v* Pedder	4 Campb. 257	Ship, 65-6	263
—— *v* ——	Holt, 72	Agent, 90	22
—— *v* Robinson	4 Esp. 98	Insurance, 38, 42	167
——, Thorogood *v*	1 Gow, 105	Carriers, Appendix	350
Marshall *v* Cliff	4 Campb. 133	Evidence, 303	140
Marshal *v* De la Torre	1 Esp. 367	Ship, 75	264
—— Hatchet *v*	Peake, 172	Practice, 8	240
—— *v* Parker	2 Campb. 70	Insurance, 164, 180-1	176-8
——, Sikes *v*	2 Esp. 705	Witness, 55, 95	325-7
		Evidence, 117	127
Marson *v* Barber	1 Gow, 17	Bankrupt, Appendix	347
—— *v* Petit	1 Campb. 82, *n.*	Bills and notes, 34	73
Martin *v* Bell	1 Stark. 413	Sheriff, 26	256
——, Botting *v*	1 Campb. 317-8	Variance, 65	305
		Frauds, statute of, 3	151
——, Burrough *v*	2 Campb. 112	Evidence, 85	124
		Witness, 248	337
——, Collins *v*	2 Esp. 520	Bills and notes, 90	77
——, Cordwell *v*	1 Campb. 79 9 East, 190	Bills and notes, 41	73
——, Doe d. *v* Watts	2 Esp. 501	Landlord and tenant, 37	190
		Power, 2, 3	239

NAMES OF CASES ANALYZED.

N.

NAMES OF CASES ANALYZED.

O.

P.

NAMES OF CASES ANALYZED.

Q.

R.

	Reporters.	Titles and Placita.	Page.
Read, Edden *v*	3 Campb. 339	Agent, 117	24
		Stamps, 41	274
		Vendor and purchaser, 55.	313
Read *v* Hutchinson	3 Campb. 352	Vendor and purchaser, 44.	311
—— *v* Passer	Peake, 231 & 1 Esp. 213	Baron and feme, 7, 8, 9	66
		Evidence, 76, 314	124
		Witness, 23	322
Reddie *v* Scoolt	Peake, 240	Action on the case, 21	10
Redhead *v* Cater	4 Campb. 188, 1 Stark. 14	Agent, 118	24
		Ship, 2	258
		Statutes, 9	276
Redman *v* London	3 Campb. 503	Insurance, 139	175
Redpath *v* Roberts	3 Esp. 225	Landlord and tenant, 19	189
		Use and occupation, 2	295
Redshaw *v* Jackson	1 Campb. 372	Bills and notes, 340	96
Redwood, Rouse *v*	1 Esp. 155	Evidence, 224, 240	89, 135
Reed *v* Ayton	Holt, 503	Bankrupt, 157	60
——, Bernard *v*	1 Esp. 91	Smuggling, 2	270
——, Potts *v*	6 Esp. 57	Bills and notes, 88	77
—— *v* White	5 Esp. 122	Partners, 70	224
		Ship, 103	266
Rees *v* Marquis of Headfort	2 Campb. 574	Bills and notes, 296	93
—— *v* Smith	2 Stark. 31	Practice, 113-4	248
—— *v* Warwick	2 Stark. 411	Bills and notes, Appendix.	348
Reeves, Colwill *v*	2 Campb. 575	Action, 31-2	4
Reichard, Bolton *v*	1 Esp. 106	Bills and notes, 76	76
Reid *v* Hagedorn	3 Campb. 377	Evidence, 141	129
		Insurance, 21-2	165
——, Hutchinson *v*	3 Campb. 32[illegible]	Set-off, 14	252
——, Mee *v*	Peake, 23	Witness, 216	335
——, Licet *v*	Peake, 35	Justices, 10	187
Remmie v Hale	MSS.	Witness, Appendix	
Remnant, Dawson *v*	6 Esp. 24	Statutes, 40	279
Rennards, Wild *v*	1 Campb. 425, *n.*	Bills and notes, 129	80
Rennell v Wither	MSS.	Trespass, 35-6	291
Retberg, Cochran *v*	3 Esp. 121	Ship, 42, 77	261-4
		Evidence, 202	133
		Time, 3	287
Reusse *v* Meyers	3 Campb. 475	Evidence, 99	125
		Variance, 96	308
Rex *v* Lord Abingdon	1 Esp. 226 and Peake, 236	Costs, 3	104
		Partners, 9	219
		Libel, 39	197
		Practice, 78, 89, 100	245-7
		Statutes, 38	279
—— *v* Akenhead	Holt, 469	Statutes, 59	280
—— *v* Akers	6 Esp. 125, *n.*	Smuggling, 1	271
—— *v Alchorne*	MSS.	Practice, Appendix	
—— *v* John Baldwin	3 Campb. 265	Felony, 17	148
—— *v* Ball	1 Campb. 324	Felony, 23	148
—— *v* Banks	1 Esp. 144-6	Informer, 1	160
		Felony, 20	148
		Statutes, 34-5	278
—— *v* Barnes	[illegible] Stark. 243	Felony, 25-6	148
—— *v* Barnett	3 Campb. 344	Penal action, 19	227
		Evidence, 31	121
—— *v* Barr	4 Campb. 16	Nuisance, 10, 11	214

NAMES OF CASES ANALYZED.

N n

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

S.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

T.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

W.

NAMES OF CASES ANALYZED.

NAMES OF CASES ANALYZED.

NAMES OF CASES REFERRED TO.

NAMES OF CASES REFERRED TO.

B.

C.

NAMES OF CASES REFERRED TO.

D.

NAMES OF CASES REFERRED TO.

E.

F.

G.

NAMES OF CASES REFERRED TO.

H.

K.

L.

NAMES OF CASES REFERRED TO.

NAMES OF CASES REFERRED TO.

Q.

R.

NAMES OF CASES REFERRED TO.

S.

NAMES OF CASES REFERRED TO.

NAMES OF CASES REFERRED TO.

YEAR BOOKS CITED.

H. 21. fo. 46. pl. 64	Attorney, pl. 47	45
M. 27, fo. 12, pl. 48	Misnomer, pl. 4	212
P. 44, fo. 21, pl. 28	Agreement, pl. 22	26
48 Ass. fo. 315, pl. 6	Appendix, Peerage,	361

HENRY IV.

H. 7, fo. 35, pl. 3	Officer, pl. 11	206
M. 9, fo. 7, pl. 20	Appendix, Practice,	365

HENRY V.

M. 9, fo. 14, pl. 23	Agreement, pl. 22	27

HENRY VI.

T. 2, fo. 11, a. pl. 1.	Evidence, pl. 336	142
P. 4, fo. 21, a. pl. 6	Landlord and tenant, 78	193
P. 7, fo. 22, pl. 3	Trover, pl. 5	292
M. 10, fo. 26, pl. 88	Assumpsit, pl. 53.	38
Anno 14, fo. 18, pl. 58	Barrister, pl. 1	69
P. 21, fo. 41, pl. 12. (F. Garranty, 16)	Assumpsit, pl. 53	38
H. 21, fo. 31, pl. 17	Evidence, pl. 291	139
P. 21, fo. 37, pl. 4	Abatement, pl. 6	1
M. 33, fo. 43, pl. 23	Set off, pl. 2-31	251-4
M. 37, fo. 8, pl. 18	Barrister, pl. 2	69
P. 38, fo. 27, pl. 8	Evidence, pl. 333	142

EDWARD IV.

M. 1, fo. 1, pl. 2	Action on the case, pl. 21	10
P. 5, fo. 2, pl. 13	Abatement, pl. 6	1
P. 5, fo. 2, pl. 20	Carriers, pl. 13	100
P. 5, fo. 3, pl. 27	Evidence, pl. 333	142
T. 11, fo. 2, pl. 4	Attorney, pl. 47	45
T. 11, fo. 4, pl. 8	Officer, pl. 11	216
M. 14, fo. 1, pl. 5	Partners, pl. 79	225
P. 17, fo. 1 and 2, pl. 2	Appendix, Trover,	371
P. 22, fo. 10, pl. 29	Trover, pl. 1	292

RICHARD III.

M. 2, fo. 9, pl. 22	Action on the case, pl. 43	11

HENRY VII.

H. 2, fo. 8, pl. 1	Agreement, pl. 36	28
M. 5, fo. 3, pl. 6	Replevin, pl. 1	249
M. 20, fo. 2, pl. 4	Action on the case, pl. 21	10
	Baron and feme, pl. 42	68
	Bills and notes, pl. 241	89

HENRY VIII.

M. 27, fo. 27, pl. 10	Action on the case, pl. 87	14

ORIGINAL CASES.

ORIGINAL CASES.

ERRATA.

Page 51, pl 26, add " Windham v Patterson, 4 Campb 286 Ellenborough, C J 1815 "
—— 54, pl 79, for " sufficient," read " insufficient "
—— 57, pl 121, for " pledge," read " pledgee "
—— 79, pl 122, add " But the court set aside the verdict found for the plaintiff, 2 B & A. 26 "
—— 11[illegible], pl 39, for " priority," read " privity "
—— 120, pl 12, for " the parties in," read " the postea is "
—— 120, pl 105, for " Buller v Mitchell," read " Bullen v Michell, 2 Price, 399 "
—— 128, pl. 135, for " a declaration of W." read " as a declaration of W " and for " to the Earl," read " to be Earl "
—— 183, pl 259, for " adjusted," read " not adjusted "
—— 184, pl 24, for " And if the purchaser," read " If the purchaser of goods to be paid for by bill."
—— 208, pl 4, n for " be not as a misdemeanor and criminal injury," read " having for its object a misdemeanor and *criminal* injury, be not "
—— 240, pl. 2, for " A was," read " As to "
—— 253, pl 16, for " consideration," read " condition "
—— 254, pl 34, for " Ibid " read " Ord v Ruspini, 2 Esp 570 Kenyon, C J. 1797 "
—— 344, Agent, A dele " By."
—— 371, line 4 of 2d column, for " cases do exist," read " ceases to exist "

THE END.

Davidson, Old Boswell Court, London.